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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 521

CENTRAL BANK, A CORPORATION, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED DECEMBER 30, 1952
CERTIORARI GRANTED MARCH 9, 1953

SUPREME COURT OF THE UNITED STATES

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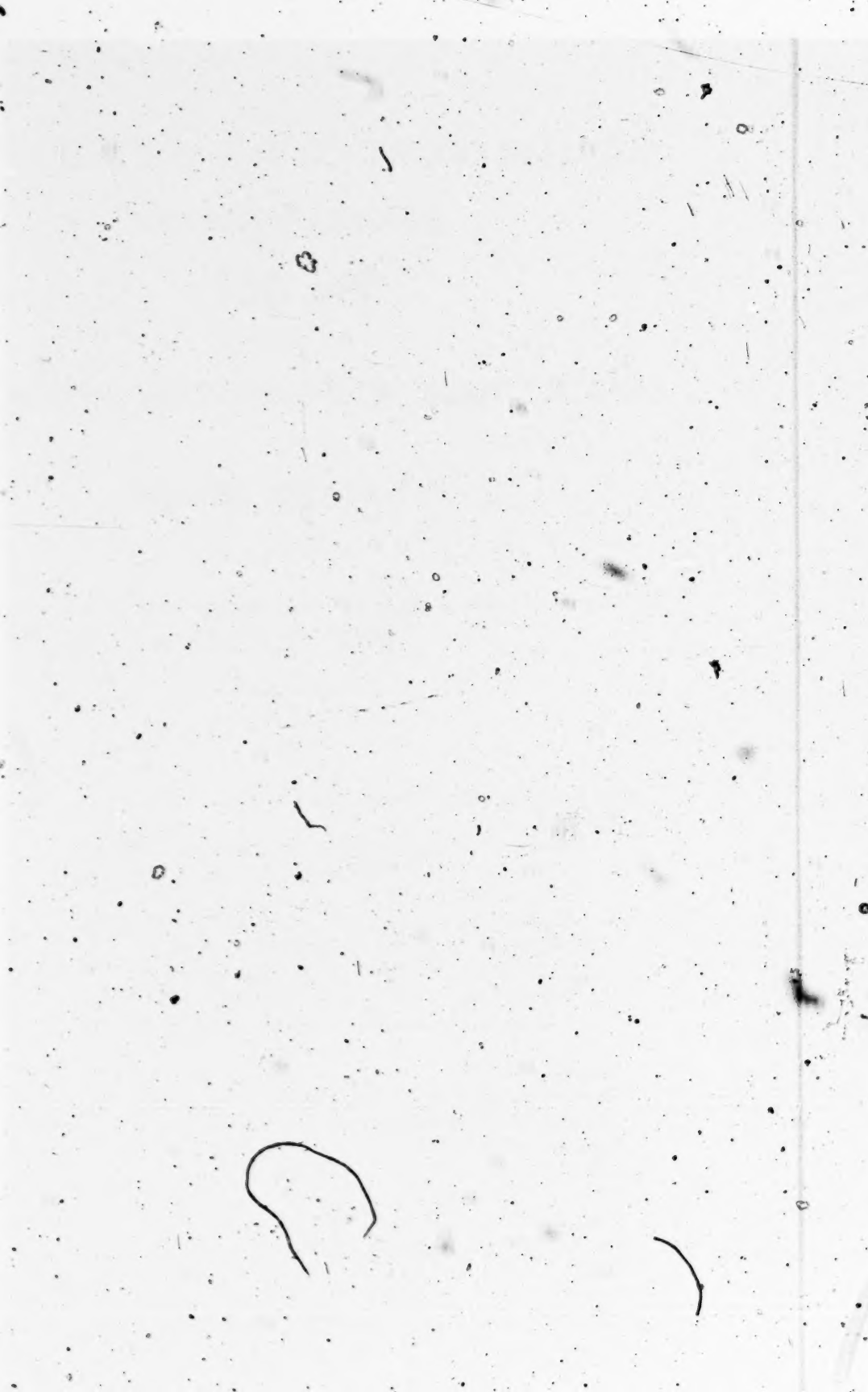
INDEX

	Original	Print
Record from the United States Court of Claims	1	1
Petition	1	1
Exhibit 1—Contract dated December 30, 1944 between the United States of America and Graham Ship Repair Co.	13	10
Exhibit 2—Assignment of above contract by Graham Ship Repair Co. to Central Bank	73	56
Exhibits 3, 4 and 5—Notices of assignment	75	58
Exhibit 6—Letter dated May 18, 1950 from Comptroller General to Central Bank of Oakland	80	62
General traverse	89	68
Stipulation of facts	91	68
Argument and submission	97	72
Special findings of fact	100	73
Conclusion of law	102	75
Opinion, Littleton, J.	102	75
Judgment	107	79
Proceedings after entry of judgment	109	79
Clerk's certificate (omitted in printing)	111	
Order allowing certiorari	112	80



[fol. 1]

IN THE UNITED STATES COURT OF CLAIMS

No. 49825

CENTRAL BANK, a corporation, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

PETITION—Filed September 22, 1950

To the Honorable, the Chief Judge and the Associate Judges of the Court of Claims of the United States:

I

The plaintiff, a corporation duly organized under and by virtue of the laws of the State of California, with its principal office and place of business located in the City of [fol. 2] Oakland, State of California, files this petition to recover from the United States of America the sum of $110,966.08, or such greater amount as may be legally due, including interest as required by law. The said amount of $110,966.08 represents the sum legally due the plaintiff, as assignee of Graham Ship Repair Company, Oakland, California, by the defendant and illegally withheld from the plaintiff by the defendant.

II

On December 30, 1944, Graham Ship Repair Company, Oakland, California, entered into a contract with the Navy Department of the United States for ship repair work. Said contract is known and identified as NObs-10230 and a copy of said contract is attached hereto as plaintiff's Exhibit 1. Agreement amending said contract is attached hereto as plaintiff's Exhibit I(a).

III

After the execution of said contract with the Navy Department of the United States, the Graham Ship Repair Company arranged with the plaintiff, Central Bank, Oak-

land, California, for the financing of the work and as consideration and security for the funds to be advanced the Graham Ship Repair Company on January 31, 1945 assigned the contract and the proceeds payable thereunder to the plaintiff bank. This assignment was made and properly executed under the provisions of the Assignment of Claims Act of 1940, 54 Stat. 1029. A copy of the said assignment is attached hereto as plaintiff's Exhibit 2.

[fol. 3] The Navy Department, the Contracting Officer and the representatives of the defendant were all duly notified of the said assignment made on January 31, 1945 as required by the provisions of the Assignment of Claims Act of 1940. Copies of the notice of assignment, to which was attached a copy of the said assignment, are attached hereto as Exhibits 3, 4 and 5.

At all times mentioned in this petition plaintiff was engaged in business as a bank.

IV

The Assignment of Claims Act of 1940, supra, provides that:

> Any contract entered into by the War Department or the Navy Department may provide that payments to an assignee of any claim arising under such contract shall not be subject to reduction or set-off, and if it is so provided in such contract, such payments shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of such contract.

The contract here involved (Plaintiff's Exhibit 1), under article 15(o), contains a provision to that effect pursuant to which the referred to assignment was executed.

V.

After the execution of said assignment the plaintiff did advance and loan to said Graham Ship Repair Company substantial sums of money to pay for labor and material

costs in connection with the work of said Graham Ship [fol. 4] Repair Company under said contract NObs 10230, and there is now, and at all times since the completion of said contract prior to December 1, 1946, there has been due and unpaid an amount in excess of $110,966.08 on account of said loans, for which unpaid amounts Graham Ship Repair Company is indebted to plaintiff; and at all times herein mentioned the amounts due or to become due under Contract NObs 10230 were pledged and assigned to plaintiff as aforesaid as consideration and security for said loans.

VI

The work under the said contract NObs 10230 was duly completed by said Graham Ship Repair Company early in 1946 and prior to December of 1946. The Navy Department made an audit in due course, as required by law, and administratively determined that there was due under the said contract assigned to plaintiff as shown above, and as a result of the work having been duly completed, the sum of $110,966.08, and your plaintiff has made due claim for the payment to it of said sum.

VII

On account of conflicting claims for the aforesaid sum of $110,966.08 made by the Collector of Internal Revenue, San Francisco, California and your plaintiff, as assignee under the Assignment of Claims Act of 1940, the Navy Department transmitted the vouchers for the payment of $110,966.08, on or about June 25, 1949, to the Comptroller General of the United States for final approval of payment of the $110,966.08 to your plaintiff.

[fol. 5]

VIII

The claim of the Collector of Internal Revenue of the United States at San Francisco, California to the aforesaid sum of $110,966.08 arose by reason of the filing of liens in December of 1946 by said Collector against Graham Ship Repair Company for unpaid Federal taxes. The said Collector claimed that said Graham Ship Repair Company was liable to said Collector and/or the Commissioner of

Internal Revenue of the United States for $453,469.55 in Federal income taxes and $11,462.91 Federal unemployment taxes which Graham Ship Repair Company, as agent for the Government, withheld from employees as withheld income tax and unemployment insurance (social security) taxes on their wages, and then failed to transmit to the Government. In December of 1946 the Commissioner of Internal Revenue of the United States and/or said Collector of Internal Revenue issued and made assessments of the aforesaid Federal taxes against the Graham Ship Repair Company and after the assessment of said taxes, and in December of 1946, the said Collector of Internal Revenue filed the said liens against Graham Ship Repair Company.

IX

On May 18, 1950 the Comptroller General of the United States, by a letter addressed to your plaintiff, refused to approve payment of the said sum of $110,966.08 to your plaintiff; rejected your plaintiff's claim to said sum; determined that the taxes claimed by the said Collector of Internal Revenue could be offset against the amounts due on the contract; approved the claim of said Collector; and held that the sum of $110,966.08 should be applied against [fol. 6] the sums alleged by said Collector to be due for said Federal taxes. In said letter the Comptroller General of the United States admitted that there was due and owing under the contract here involved the sum of $110,966.08; that the plaintiff was properly and legally an assignee of the contract under the said Assignment of Claims Act of 1940; that the assignment from Graham Ship Repair Company to your plaintiff complied with the provisions of the Act; and that your plaintiff had complied with the requirements of said Act. The said Comptroller General of the United States held, however, that the said Federal taxes alleged to be due from Graham Ship Repair Company by said Collector were not "any indebtedness of the assignor to the United States arising independently of such contract" and could be set-off, therefore, against the amounts due under the contract. A copy of said letter of the said Comptroller General of the United States is attached hereto as plaintiff's Exhibit 6.

X

Being aggrieved by the said decision and determination of the Comptroller General of the United States; believing that the decision and determination of the said Comptroller General is clearly erroneous and that your plaintiff is fully, justly and legally entitled to the payment to it by the defendant of the full sum of the said $110,966.08, your plaintiff files this petition for the recovery from the defendant of the full sum of $110,966.08 plus interest as required by law.

XI

Your plaintiff alleges that the said decision and determination of the said Comptroller General of the United [fol. 7] States was illegal, improper, unjust, erroneous and a clear violation of the provisions of the Assignment of Claims Act of 1940 and the intent and purpose thereof and that the claim of your plaintiff for the payment to it of the full sum of $110,966.08 was proper, valid, legal and should have been allowed and approved in full by the Comptroller General of the United States under the provisions of the Assignment of Claims Act of 1940.

XII

Your plaintiff alleges that the liens of the said Collector of Internal Revenue at San Francisco, California were filed long after the valid assignment to the plaintiff of the contract here involved and that, as conceded by the Comptroller General, the said liens were not prior or superior to the plaintiff's claim under said assignment executed under the provisions of the Assignment of Claims Act of 1940, protecting lending institutions in the financing of Government contracts for the purposes of national defense. The liens of said Collector of Internal Revenue were not filed until December of 1946 whereas the assignment here involved was executed and became legal and binding upon all parties concerned, including the plaintiff and the defendant, on January 31, 1945.

XIII

Your plaintiff alleges that, as was also conceded by the Comptroller General, the amount of $110,966.08 due your plaintiff under said assignment of January 31, 1945 was not impressed with any valid or legal trust for Federal taxes. Under the facts of this case, the contract rights [fol. 8] and funds due under the contract were assigned to the bank before any liability arose and long before the assessment of said Federal taxes or the filing of liens by the said Collector. If said Federal taxes here under consideration constituted trust funds for the Government of the United States, and if the contractor converted such funds to his own use, violated the trust or embezzled the trust funds, such acts and the indebtedness of the contractor resulting therefrom for which the contractor itself might be civilly or criminally responsible constituted acts of the contractor-assignor "arising independently of such contract" and therefore not allowable as an offset under the Assignment of Claims Act of 1940 enacted for the protection of banks and financial institutions in financing Government contracts against moneys due under an assigned contract. The said Act clearly provided that payments due the assignee under an assigned contract "shall not" be subject to reduction or set-off "for any indebtedness of the assignor to the United States arising independently of such contract".

XIV

Your plaintiff alleges that the obligation of the assignor, Graham Ship Repair Company, for the payment of Federal taxes arose independently of the contract here involved and by reason of the Federal Revenue laws. The Federal Revenue laws provided and imposed the liability of the contractor for Federal taxes. The Navy contract assigned to plaintiff under the Assignment of Claims Act of 1940 did not impose the liability of the contractor for Federal taxes and had nothing to do with the Federal Revenue [fol. 9] Statutes under which liability for Federal taxes arise. The amount of Federal taxes due from the contractor are determined by the Federal Revenue laws and not by

the Navy contract here involved. The Federal taxes are administered and collected by a separate and distinct department of the Federal Government, the Treasury Department, as disinguished from the Navy Department, which negotiated the contract here involved. Since the liability of the contractor for Federal taxes and any obligation to pay or collect Federal taxes arose under the Federal Revenue laws and "independently" of the contract here involved, the alleged liability of the contractor for Federal taxes cannot be legally or properly set off against the payment due the assignee, the plaintiff herein, under the provisions of the Assignment of Claims Act of 1940.

XV

Plaintiff further alleges that the legislative history of the Assignment of Claims Act of 1940 shows and demonstrates that the said Act was passed and enacted by the Congress of the United States for the purposes of financing the national defense and to protect and to aid banks and other financial institutions in financing and loaning money to contractors dealing with the Federal Government during the war emergency.

During the United States Senate hearings on the Assignment of Claims Act of 1940 and in explaining its provisions, Senator Barkley stated that under the Act's provisions "it shall not be permissible to offset against the claim or contract later an indebtedness which the contractor may owe the Government on account of some other contract or some [fol. 10] other situation. In other words it is an effort to make it possible for contractors to go to private lending institutions and, by assigning their contracts with the Government obtain private funds in order to carry out the work, instead of coming to some public lending agency".

Under this expression of legislative purpose the Government would have no right to withhold from an assignee moneys due under an assigned contract merely because the assignor contractor was indebted to the Government because of unpaid taxes.

XVI

It is further alleged by your plaintiff that the decision and action of the Comptroller General of the United States in refusing payment to your plaintiff violates and sets at naught the very purpose for which the Assignment of Claims Act of 1940 was enacted, the protection of financial institutions, such as your plaintiff, in promoting the interests of national defense. And to hold, as the Comptroller General did in his letter of May 18, 1950, that an indebtedness of the contractor for taxes which he collected from his employees as an agent of the Government and failed to remit to the Government is an indebtedness arising out of the contract which was assigned to the plaintiff as aforesaid and is an indebtedness which may be offset against amounts due for work performed under said contract and payable to plaintiff as assignee of said contract, is not only illogical and improper but also constitutes an illegal interpretation of the Assignment of Claims Act of 1940 and also violates the purpose and intent thereof.

Your plaintiff alleges that the assignment of the contract was valid when made on January 31, 1945; that at that [fol. 11] time your plaintiff could have had no knowledge that the contractor would not pay all taxes claimed by the said Collector at San Francisco or the Commissioner of Internal Revenue of the United States; that your plaintiff acted in good faith in accepting the assignment of January 31, 1945 and at all times since said date; that your plaintiff is entitled to the protection afforded by the Assignment of Claims Act of 1940; and that said Act was enacted by Congress for the very purpose of safeguarding the plaintiff and other lending institutions from the very situation, among others, that has arisen in this case.

XVII

No action upon the claims herein made other than that herein stated has been taken before Congress or any other of the departments of the United States, or in any Court other than the petition filed in this Court.

Your plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to

rebellion against said Government. Your plaintiff is the sole and absolute owner of the claim herewith presented and has made no transfer or assignment of said claim or any part thereof, and is justly entitled to the amount claimed herein from the United States after allowing all just credits and off-sets.

Your plaintiff believes the facts as herein stated to be true.

Wherefore, plaintiff prays for judgment in its favor for said sum of $110,966.08, or for such other and further [fol. 12] amount as this Court may find to be justly due your plaintiff together with interest as provided by law and for such other and further relief as this Court may deem just and proper.

Llewellyn A. Luce, 937 Munsey Building, Washington, D. C., George H. Koster, 300 Montgomery Street, San Francisco 4, California. Attorneys for Plaintiff.

Duly sworn to by —— —— jurat omitted in printing.

[fol. 13] EXHIBIT 1 TO PETITION

Navy Department
Bureau of Ships
(Revised 4-19-43)
(With Revisions to 10-28-43)
(Corrected)

Contract No. NObs 10230

Contract
for the repair or alteration of
vessels at Oakland, California
United States of America
Navy Department

(Government)

Graham Ship Repair Co. (A Partnership)
501 First Street, Oakland, California

(Contractor)

Dated: 30 December 1944

Effective Rates Per Payable Hour—

	First Quarter	Second Quarter	Third Quarter	Fourth Quarter
1943				
1944				
1945				
1946				
1947				

Rate includes use of Dry Dock and Marine Railways: Yes X No

Three signed copies must be returned to the Bureau of Ships, Navy Department, Washington, D. C., via Naval Cost Inspector at Contractor's plant. Do not send them [fol. 14] direct to Washington. Hand them to your Naval Cost Inspector for endorsement. One executed copy will be returned for your files.

Each quarter the report required under Article 5(d) must be handed to Naval Cost Inspector at Contractor's

plant for endorsement. Do not send the quarterly reports direct to Washington.

NAVships (776)

Contents

		Page
Article 1.	Purpose	1
Article 2.	Preliminary Arrangements	1
Article 3.	Job Orders	2
Article 4.	Performance	2
Article 5.	Compensation	3
Article 6.	Annual Review and Abatement of Charges	8
Article 7.	Records	9
Article 8.	Entering and Leaving Dry Dock	10
Article 9.	Plans, Specifications, and Manner of Doing Work	10
Article 10.	Subcontracts	12
Article 11.	Risk of Loss; Insurance	12
Article 12.	Guarantees	14
Article 13.	Title	14
Article 14.	Liens	14
Article 15.	Contract not Transferable	14
Article 16.	Patents	15
Article 17.	Stipulations under Walsh-Healey Act	16
Article 18.	Workmen's Compensation Insurance	16
Article 19.	Nonrebate	16
Article 20.	Convict Labor	16
Article 21.	Nondiscrimination in Employment	16
Article 22.	Plant Protection	17
[fol. 15] Article 23.	Disclosure of Information	17
Article 24.	Alien Employees of Contractor and Subcontractor	18
Article 25.	Reports of Espionage, Sabotage, or Subversive Activities	18
Article 26.	Officials not to Benefit	19
Article 27.	Covenant Against Contingent Fees	19
Article 28.	Disputes	19
Article 29.	Renegotiation	20
Article 30.	Cancellation and Termination	21
Article 31.	Definitions	23
Article 32.	Period of the Contract	24

This negotiated contract entered into as of this 30th day of December, 1944, by and between the United States of America (hereinafter called the "Government"), represented by the Contracting Officer executing this contract, and Graham Ship Repair Co. a partnership organized and existing under the laws of the State of California (hereinafter called the "Contractor"),

Witnesseth:

Whereas, the Government will from time to time require the repair, completion, alteration of or additions to Naval vessels of the Government and other nations and merchant vessels of United States and other registry and portions thereof, plans, spare parts, and equipment therefor;

Whereas, the Contractor has an organization, plant, and facilities at Oakland, Calif. (hereinafter called the "plant") of sufficient capacity for doing such work and is willing, whenever required by the Navy Department, to do such work as conditions at the time will permit it to undertake; and

[fol. 16] Whereas, the Contracting Officer has determined that this contract will facilitate the prosecution of the war;

Now, therefore, in consideration of the premises and of the mutual covenants and agreements hereinafter contained, the parties hereto mutually agree as follows;

Article 1.—Purpose

The purpose of this contract is to establish the terms upon which the Contractor will provide berthing, drydocking, marine railway, shipyard, and other facilities together with materials and services for effecting expeditious repairs, completion, alterations of and additions to Naval vessels of the Government and other nations and merchant vessels of United States and other registry and portions thereof which may be ordered to the Contractor's plant or another location for the performance of work hereunder from time to time during the period of this contract.

Article 2.—Preliminary Arrangements

Whenever the Government desires the Contractor to effect the repair, completion, alteration of or addition to a

Naval vessel of the Government or of another nation or a merchant vessel of United States or other registry; the Government shall notify the Contractor of the nature of the work to be performed, the date proposed for delivery of the vessel to the Contractor, and the desired date for completion of the work by the contractor. Upon being so notified, the Contractor shall promptly advise the Government regarding its ability to accept the vessel and to perform the work as required. If satisfactory dates for com- [fol. 17] mencing and completing the work are agreed upon, the Contractor shall make the necessary arrangements for receiving the vessel on the agreed date, and for berthing her alongside its wharves or in its drydock or on its marine railway, or in the vicinity of its plant, or other location where the work is to be performed, as required, such arrangements to be satisfactory in each case to the authorized representative of the Chief of the Bureau of Ships, such representative being hereinafter referred to as the "Naval Inspector".

1

Article 3.—Job Orders

As soon as practical after the arrival of the vessel at the Contractor's plant or in the vicinity thereof or other location where the work is to be performed, the items of work which it is desired to accomplish on such vessel shall be inspected jointly by the Contractor and the Naval Inspector and job orders setting forth the items of work to be accomplished shall be prepared by the Naval Inspector. If inspection requires the opening up of machinery and equipment and its closing after inspection, a job order shall be prepared covering that work. Items of repair shall be set forth in separate job orders from those setting forth items of alteration, completion or addition and each job order shall specify in reasonable detail the repair or completion, alteration or addition necessary to be accomplished on an individual item. When a job order is agreed upon, it shall be signed by an officer or other authorized representative of the Contractor and by the Naval Inspector. If additional work is to be done on such vessel, addi-

[fol. 18] tional job orders shall be prepared and executed as provided in this article.

Article 4.—Performance

(a) Upon the signing of a job order, the Contractor shall promptly commence the work specified therein and diligently prosecute the same to completion to the satisfaction of the Naval Inspector.

(b) The Contractor shall furnish all necessary material, labor, equipment, power, accessories, facilities, and such other things as are necessary for accomplishing the work specified in the job order.

(c) The Contractor shall furnish electricity, compressed air, steam, fresh water, and flushing water to the ships as required by the Naval Inspector and shall furnish for the use of naval personnel tools and equipment, including falls, stage planking, cranes, scrapers, hose, paint pots and brushes as required by the Naval Inspector in such quantities as required.

(d) The Contractor shall, without a job order being required:

(i) Furnish the Naval Inspector or Inspectors and Cost Inspector or Inspectors, with suitable offices, office equipment and telephones at or near the Contractor's plant, provided that requests for increased office space shall be approved in writing by the Contracting Officer;

(ii) Make available the usual washroom and toilet facilities for the use of the personnel of the vessel while in dry dock or on marine railway and supply and maintain in a condition satisfactory to the Naval Inspector suitable brows and gangways from the dry dock or marine railway to the vessel;

[fol. 19] (iii) Store salvage, scrap or other material designated by the Naval Inspector in the Contractor's plant up to sixty days;

(iv) Perform, or pay the cost of, any reconditioning or repairing rendered necessary as the result of the use by the Contractor of any of the vessel's machinery, equipment or fittings, including winches, pumps, rigging, or pipelines.

(e) The Contractor shall conduct dock and sea trials of the vessel as required by the job orders. Such trials shall be carried out by the vessel's crew with representatives of the Contractor on board to check performance and satisfactoriness of operation.

2

(f) The Contractor shall provide and install all fittings and appliances which may be necessary for the dock and sea trials, to enable the representative of the Government to determine whether the requirements of the job orders, plans and specifications have been met, and the Contractor shall be responsible for the care, installation and removal of instruments and apparatus furnished by the Government for such trials.

(g) The Contractor shall furnish on a job order, when requested and if available, temporary stenographic assistance to the Naval Inspectors and Naval Cost Inspectors.

(h) If the Contracting Officer shall determine during the course of the work on any vessel that the work is being inefficiently performed, he shall so notify the Contractor in writing during the course of the work on such vessel stating in such notice wherein the said work is being inefficiently performed.

[fol. 20] Article 5.—Compensation

(a) The Contractor shall be paid for work done under all job orders hereunder amounts accepted by the Naval Cost Inspector as follows:

(i) At the rate of $2.25 for each hour of Payable Hours of Direct Labor. "Payable Hours of Direct Labor" is defined for the purpose of this contract as: The sum of the quotients obtained by dividing the total wages of workmen performing direct labor on the work by their respective wage rates. If the Contractor consistently does so for all purposes of this contract, it may, at its option, include shift work and dirty work premiums and allowances for lunch periods as a portion of the wage rates; otherwise, wage rates shall be first shift straight time rates. Total wages shall include but not be limited to straight time, over-

time, shift work, allowances for lunch periods and rest periods required by law, travelling time, dirty work premiums and incentive bonuses. Direct labor shall be labor performed by the Contractor's employees directly upon and properly chargeable directly to the work; foremen (including leading men, snappers, quartermen, etc.) shall be considered as direct laborers if the Contractor consistently classifies in its accounting system the wages of the foremen with the wages of direct labor but otherwise the wages of foremen shall be included with indirect expenses.

When wage scale rates on new construction work, as defined in the applicable Zone Standard Agreements, apply to work under this contract, the billing rate above set forth, or as hereafter agreed, shall be reduced by the difference between the hourly straight time wage scale of first-class [fol. 21] mechanics on repair work and the same wage scale on new construction work as contained in the applicable Zone Standard Agreement.

(ii) The amount of each subcontract hereunder made with the approval of the Naval Inspector as required by Article 10 hereof (except subcontracts for temporary facilities, tools and equipment and services in connection therewith) and of the Contractor's Cost of Direct Materials (as hereinafter defined). The "Contractor's Cost of Direct Materials" is defined as:

The net purchase price, including but not limited to transportation charges and sales and excise taxes which the Contractor is required to pay, of all purchased materials and fabricated parts entering directly into the work or which are used directly in fabricating or processing such materials and parts and all items directly chargeable to the work not otherwise chargeable under the provisions of this paragraph (a), provided said charges are approved by the Naval Cost Inspector; but not including the amount of any subcontract charged hereunder. Purchases made specifically for the work will be taken at their net purchase prices as provided in paragraph (e) of this Article 5. To the extent that any division or affiliate of the Contractor shall furnish any materials, supplies or equipment hereunder which in the industry are usually procured from

others in performing a ship repair, completion, alteration or addition contract, the cost, for the purposes of this paragraph, of such materials, supplies or equipment may be equal to but not in excess of the prevailing market prices. Withdrawals from regular stores or stock rooms will be [fol. 22] taken at their cost under any recognized method of pricing stores withdrawals conforming to sound accounting practices and consistently followed. Material costs will include only the cost of materials required to be used for the work. Direct materials will include consumable supplies such as cleaning material, template material and pattern stock, used directly in connection with the work although not permanently incorporated therein.

(iii) Charges for use of temporary facilities, tools and equipment and services in connection therewith hired from third persons for the performance of any part of the work with the approval of and at rates of hire approved by the Naval Inspector, as required by Article 10 hereof;

(iv) For drydock, marine railway, floating derrick, and tugboat services furnished at rates specified in Schedule "A" attached hereto, if such rates are provided in a Schedule "A" hereto;

(v) For electricity, steam, fresh water, compressed air, and flushing water furnished to a vessel, at rates approved by the Naval Cost Inspector;

(b) Anything in this contract to the contrary notwithstanding, the Contracting Officer may require the Contractor to enter into negotiations with the Contracting Officer for the purpose of agreeing upon a price as in this paragraph (b) provided.

(i) Upon notice in writing from either the Contracting Officer or the Contractor to the other within sixty (60) days after the end of each calendar quarter or within sixty (60) days after the end of any shorter fiscal period or within sixty (60) days after completion and billing for all work on an individual vessel, the Contracting Officer and the Contractor shall negotiate to determine the price to be [fol. 23] paid for work billed during such quarter or shorter time or on such vessel as provided in such notice. When an

agreement is reached as to the price to be paid, it shall be set forth in a written supplemental agreement.

4

(ii) If, within thirty (30) days after commencing such negotiations, no agreement has been reached regarding the price, the question may be submitted for final determination to the Secretary of the Navy by the Contractor or by the Contracting Officer. A Board composed of one representative each of the Secretary of the Navy, the Secretary of War and the Administrator, War Shipping Administration, after considering any matters which may be presented to it by the Contractor as hereinafter provided, shall make its recommendations regarding the question to the Secretary of the Navy. The Contractor may, if he so desires, within ten (10) days from and after the date on which the Contractor submits the question to the Secretary of the Navy, or from and after the date the Contractor receives notice that the Contracting Officer has submitted the question to the Secretary of the Navy, present in writing to such Board any facts or circumstances which may, in the Contractor's opinion, have a bearing upon the price to be determined. After considering the recommendations of the Board, the Secretary of the Navy shall determine the price to be paid, and his determination shall be final and conclusive.

(iii) If the total of the payments made to the Contractor pursuant to paragraph (a) of this Article 5 for work during the period or on the vessel for which a price has been agreed [fol. 24] to or determined pursuant to this paragraph (b) exceeds such price, the amount of such excess shall be credited against payments to which the Contractor is otherwise entitled hereunder or paid to the Government by the Contractor at the option of the Government. If such total is less than such price, the Contractor shall be paid the amount by which such total is less than such price. Neither the pendency of negotiations concerning a price, nor the fact that any question of a price has been submitted to the Secretary of the Navy for determination, as provided in paragraph (b)(ii) of this Article 5, shall be construed as a basis for withholding any payments due under paragraph (a) of

this Article 5, or any credits or payments due under this paragraph (b)(iii), or any credits or payments due under paragraph (b) of Article 6.

(iv) When amounts payable in respect to work done are finally settled, agreed upon or determined pursuant to paragraphs (a) and (b) of this Article 5, the Contracting Officer shall certify to such amounts.

(c) The compensation paid to the Contractor pursuant to paragraphs (a) and (b) hereof shall include all the amounts to which the Contractor is entitled under this contract, except any amount to which the Contractor is entitled under Articles 9, 11, 12, 22 and 30(c).

(d) The rate for Payable Hours of Direct Labor in paragraphs (a) (i) of this Article 5 shall be subject to revision as follows:

Within forty-five (45) days after the end of each calendar quarter during the existence of this contract, the Contractor shall submit to the Contracting Officer:

[fol. 25] (i) A report of the total number of Payable Hours of Direct Labor (computed in the manner provided for computing Payable Hours of Direct Labor in paragraph (a)(i) of this Article 5) for all repair, completion, alteration and addition work, whether under this contract or otherwise, performed by the Contractor at the plant or at another location for the performance of the work hereunder, during the preceding quarter, and the total amount of wages (including straight time, othertime, shift work, allowances for lunch periods and rest periods required by law, travelling time, dirty work premiums and incentive bonuses) paid therefor. Also a report of the total wages paid for direct labor for work by the plant other than repair, completion, alteration and addition work;

(ii) A report of the indirect expenses of the Contractor's entire plant for the preceding quarter classified in reasonable detail in accordance with the Contractor's accounting system. Such indirect expenses shall comprise all expenses of the Contractor, except the cost of materials and services for which charges are made under sub-paragraphs (i), (ii), and (iii) of paragraph (a) of this Article 5, paragraph (c) of Article 9, Article 12 and Article 22

hereof and all costs directly applicable to work not under this contract, subject to the limitations and exclusions described in paragraphs 43 through 46, 48 through 52 and Paragraph 54 of the pamphlet "Explanation of Principles for Determination of Costs under Government Contracts" printed by the U. S. Government Printing Office, April 1942;

(iii) A report of the total amounts charged by the Contractor under this contract or otherwise, for use in the pre-
[fol. 26] ceding quarter of facilities of the kind mentioned in paragraph (a)(iv) above and facilities and supplies of the kind mentioned in paragraph (a)(v) above, showing separately, the total of such amounts charged to the Government and all of its agencies and the total of such amounts charged to others;

(iv) Reports setting forth such additional information pertaining to this contract as may be required by the Contracting Officer.

Such reports shall be certified by two officers or other responsible officials of the Contractor, one of whom shall be a person supervising accounting with respect to this contract, and shall be deemed to be representations made by the Contractor to the Government for the purpose of inducing the payment of funds to it.

Upon the basis of the information contained in such reports and any other available information, the parties, upon the request of either, agree to negotiate in good faith to determine a revised rate per Payable Hour of Direct Labor for purposes of paragraph (a) of this Article 5, such revised rate to be effective from a date not earlier than the end of the preceding quarter, agreed upon by the parties, and the terms of such agreement shall be incorporated in an amendment to this contract. But if the parties fail to agree within seventy-five (75) days after the end of the preceding quarter, the revised rate for the applicable quarter shall be determined by the Secretary of the Navy after consideration of the recommendation of a Board composed of one representative each of the Secretary of War, the Secretary of the Navy and the Administrator, War Ship-
[fol. 27] ping Administration; such revised rate shall be incorporated promptly in an amendment to this contract.

In determining the amount of the Contractor's indirect expense there shall be deducted ten-elevenths (10/11) of an amount equal to all charges by the Contractor under Government contracts for the repair and alteration of vessels of the nature described in paragraph (a) (iv) of this Article 5, less all rentals paid to the Government on dry-dock and marine railway facilities under a Navy Department facilities contract or on waterfront facilities under a Maritime Commission or War Shipping Administration contract or lease, and ten-elevenths (10/11) of all charges by the Contractor under Government contracts for the repair and alteration of vessels of the nature described in paragraph (a)(v) of this Article 5. There shall also be deducted one-eleventh (1/11) of all moneys paid by the Contractor to the Government or any of its agencies for premiums of policies of insurance covering any risk, hazard or liability of the Contractor arising out of or in connection with this contract and an amount equal to one-eleventh (1/11) of all moneys paid by the Contractor to the Government and allocable to this contract for rental of facilities other than drydocks and marine railways under a Navy Department facilities contract, or waterfront facilities under a Maritime Commission or War Shipping Administration contract or lease.

(e) The Contractor will, by tax exemption certificates or otherwise, eliminate all taxes on material purchased for work hereunder to the extent practicable, and will to the [fol. 28] extent of its ability take all cash and trade discounts, rebates, allowances, credits, salvage, and commissions, and when unable to take advantage of such benefits it shall promptly notify the Naval Cost Inspector to that effect and the reason therefor. In determining the net cost of materials and services of every kind required for the performance of this contract, there shall be deducted from the gross cost thereof all such benefits which have accrued to the Contractor or which would, except for the fault or neglect of the Contractor, have so accrued; but such benefits lost without fault or neglect on the part of the Contractor, or lost because of the fault of the Government, including failure to pay the Contractor within the

time required by this contract, shall not be deducted from such gross cost. If the Contractor, after having been reimbursed, either directly or indirectly, by the Government for any item of services, material or overhead, subsequently receives any additional sum as a discount, rebate, allowance, credit, salvage or commission in respect of any such item, the Contractor shall promptly pay to the Government an amount equal to eleven-tenths (11/10) of such additional sum.

(f) The Contractor agrees to make every effort to complete the work under this contract in the shortest time possible by working shifts if practicable and by taking all other practicable steps to such end; but extra compensation for overtime work at the rate of double time will be payable only where the performance of overtime work at the rate of double time has been authorized in writing by the Naval Inspector in advance of the preformance of such overtime work; provided, however, that the Contractor shall not be required to perform overtime work at the rate [fol. 29] of double time unless such overtime work has been authorized by the Naval Inspector. No allowance shall be made for straight time, overtime, shift work, allowances for lunch periods and rest periods required by law, travelling time or dirty work premiums or incentive bonuses or any other type of payment, in excess of the applicable Zone Standard Agreement or applicable laws and executive orders.

(g) The Contractor shall submit monthly, and may submit at more frequent intervals when the amount payable hereunder for which an invoice or voucher has not been previously submitted exceeds $5,000, an invoice or voucher to or as directed by the Naval Cost Inspector, in as many copies as may be required by the Naval Cost Inspector. Each invoice or voucher may cover amounts accrued here-

under for which an invoice or voucher has not been previously submitted. There shall be set forth in each invoice or voucher or in a schedule attached thereto, a summarization of the amounts in each of the classifications provided in paragraph (a) of Article 5, separately stated for each

vessel. In addition, repair charges and completion, alteration or addition charges shall be separately stated for each vessel. Payment shall be made of the amount of each such invoice or voucher subject to reduction by amounts for which the Contractor is not entitled to payment hereunder and by amounts which are not accepted by the Naval Cost Inspector as chargeable under paragraph (a) of Article 5, and shall also be subject to reduction for overpayments or to increase for underpayments on preceding invoices and vouchers. The Naval Inspector may, in his discretion, [fol. 30] reserve or withhold a part (not exceeding 10%) of each payment for work on any vessel until the satisfactory completion of all job orders on such vessel, or until the agreement upon or determination of the price for work upon such vessel if notice has been given as provided in paragraph (b) of this Article 5. Payment shall be made within fifteen (15) days after receipt of a properly approved and certified invoice or voucher but no interest shall accrue on such payments if delayed. Payments provided for in this paragraph shall be made by the Assistant for Disbursing in the Office of the Supervisory Cost Inspector in the Naval district in which the plant is located; if there is no such Assistant for Disbursing, said payments shall be made by the Disbursing Officer for such Naval District.

Article 6.—Annual Review and Abatement of Charges

(a) Within sixty (60) days after the end of each year the Contractor shall submit to the Contracting Officer a financial statement with respect to its revenues, costs, and profits from the performance of work under this contract during such year. Such statement may cover either work on all vessels on which work is completed during such year or all work billed during such year, depending upon the Contractor's accounting practice consistently followed. Such statement (i) shall be prepared in accordance with the principles outlined in the pamphlet "Explanation of Principles for Determination of Costs under Government Contracts", printed by the U. S. Government Printing Office, April 1942, except paragraph 47, provided that paragraphs 9 and 44 thereof shall be modified to require that [fol. 31] deduction of all cash discounts (without except-

ing 1% cash discounts) and the costs reported shall be subject to the limitations and exclusions described in that pamphlet; (ii) shall be in the form required by the Naval Cost Inspector; and (iii) shall be certified by two officials of the Contractor including the official supervising accounting with respect to this contract. Such statement may be audited with the books and accounts of the Contractor by the Contracting Officer if he so desires.

(b) At the end of any year, or within sixty (60) days after receipt of the Contractor's report under paragraph (a) of this Article, the Contracting Officer may demand that the Contractor repay and the Contractor agrees to repay any profits earned hereunder during such year which are deemed by the Contracting Officer to be in excess of a reasonable profit, provided, that no such demand will be interpreted to require the Contractor to repay an amount

which would reduce the Contractor's profit to less than 10% of the Contractor's cost (excluding from cost and billing for this purpose the cost of furnishing special plant protection under Article 22 hereof; all moneys paid by the Contractor to the Government or any of its agencies for premiums of policies of insurance covering any risk, hazard or liability of the Contractor arising out of or in connection with this contract; the amount paid to the Contractor for furnishing temporary facilities, tools, and equipment and services in connection therewith for which the Contractor has been compensated under Article 5(a)(iii); All rentals paid to the Government under a Navy Department facilities [fol. 32] contract or a Maritime Commission or War Shipping Administration contract or lease; and the amount of all subcontracts with subcontractors affiliated with the Contractor and which have ship repair, completion, alteration and addition contracts with the Government) for such work as determined in accordance with the pamphlet "Explanation of Principles for Determination of Costs under Government Contracts", printed by the U. S. Government Printing Office, April 1942; except paragraph 47 thereof and provided further, that nothing in this paragraph or elsewhere in this contract, shall be construed to limit or

restrict the right of the Government to renegotiate pursuant to Article 29 of this contract or section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, or to affect the amount recoverable in the event of such renegotiation. The Contracting Officer shall certify to the Secretary of the Navy as to the action taken under this paragraph.

Article 7.—Records

(a) The Contractor shall keep adequate records and books of account showing the cost of all items of labor, material, equipment, supplies, services and other expenditures of whatsoever nature in connection with the performance of this contract and records showing the Payable Hours of Direct Labor worked by its employees under this contract. The method of accounting employed by the Contractor shall be subject to the approval of the Government but no material change will be made therein if the same conforms to good accounting practice and is sufficient for the purposes of this contract.

[fol. 33] (b) The Government shall at all times be afforded proper facilities for inspecting records and books of account pertaining to this contract and shall at all times during the regular daytime office hours have access thereto for such purposes. All information obtained from said records and books of account shall be treated as confidential.

(c) The Contractor shall preserve all records and books of account pertaining to this contract, provided, however, that if the Contractor shall desire at any time after six years from the date upon which final payment under this contract becomes due to dispose of said records and books of account, it shall so notify the Government which shall in writing authorize their destruction or notify the Contractor to turn over the same to the Government for such disposal as it may desire to make thereof.

(d) Should the Contractor enter into any subcontract to be performed at the site of the work, including subcontracts for materials, which is incidental to the performance of this contract and such subcontract is on any basis other than a fixed price which may not be adjusted by an escalator clause contained therein, the foregoing pro-

visions of this article shall be applicable to and included in such subcontract.

9

Article 8.—Entering and Leaving Dry Dock

(a) The decision as to whether the vessel shall be docked at the appointed time shall vest solely with the commander of the vessel. The commander of the vessel shall approach the dry dock or marine railway in a fair manner and at a [fol. 34] reasonable speed. The commander of a vessel under its own power shall have immediate charge of the vessel until the bow thereof reaches the dry dock sill or the entrance to the marine railway. The dock master shall then take charge and complete the docking, being assisted as necessary by the ship's force until the vessel has been safely docked. In undocking, the dock master shall have charge until the bow of the vessel clears the dry dock sill or the entrance to the marine railway.

(b) The Contractor shall have charge of a vessel not operating under its own power from the time the Contractor's or subcontractor's lines are secured to the vessel until such time as all Contractor's or subcontractor's lines are cast off.

(c) The Contractor shall in each case use its best efforts to have the dry dock or marine railway and other equipment to be used in connection with the repair, completion, alteration or addition of the vessel ready at the scheduled time for the arrival of the vessel.

(d) As an added protection for the Government's interests, and entirely without effect on the Contractor's responsibility for docking and undocking vessels safely, for preventing damage while they are in or on the dock or marine railway, and for making good without charge to the Government such damage as may occur and as is not caused by the Government, the Government shall have, and will normally exercise, the privilege of inspecting the dock or marine railway and the setting of the blocks before a vessel is docked and of requiring repairs or changes to any of the foregoing without charge to the Government when deemed necessary for the vessel's safety. No right to pay- [fol. 35] ment shall accrue to the Contractor for delays in

dockings caused by repairs or changes resulting from the exercise of this privilege.

Article 9.—Plans, Specifications, and Manner of Doing Work

(a) Work shall be performed hereunder in accordance with the job orders and the plans and specifications if any thereunder, and as required or permitted by the Naval Inspector.

(b) The material and workmanship shall represent the best commercial marine practice, except that with regard to military features including gun-foundations, gun-firing mechanisms, torpedo-tube installations, signal apparatus and magazines, Naval standards of material and workmanship shall be followed. The Naval Inspector will prescribe the Naval standard wherever applicable, and the decision of the Naval Inspector shall be final. All work and material shall be subject to the approval of the Naval Inspector.

(c) All material and workmanship shall be subject to inspection and test at all times, to determine their quality and suitability for the purpose intended. In case any material or workmanship is found to be defective, or not in conformity with the specifications or requirements, the Naval Inspector shall have the right to reject such material or workmanship, and to require its correction or replacement by the Contractor. The Contractor shall be paid ten-elevenths (10/11) of the amount provided in paragraph (a) of Article 5 hereof for effecting such correction or replacement. If the Contractor fails to proceed promptly with the replacement or correction of such material or workmanship as required by the Naval Inspector, the Government may, [fol. 36] by contract or otherwise, replace or correct such material or workmanship and charge to the Contractor the excess cost occasioned the Government thereby.

10

(d) No welder shall be permitted on work in connection with repairs, completion, alterations or additions unless his qualifications satisfy the Naval Inspector and he is certified by the Bureau of Marine Inspection and Navigation, or American Bureau of Shipping, or he has passed the Navy

test for welders. Likewise, welding electrodes and welding technique used shall be satisfactory to the Naval Inspector. All welding on boilers and high pressure steam lines shall be in accordance with the rules of the Bureau of Marine Inspection and Navigation.

(e) The Contractor shall exercise reasonable care to protect the vessel from fire under the prevailing circumstances. To this end the Contractor shall maintain a reasonable system of inspection over the activities of welders, burners, riveters, painters, plumbers and similar workers, particularly where such activities are undertaken in the vicinity of the vessel's magazines, fuel oil tanks or storerooms containing inflammable materials. Hose lines shall be maintained in such number and as required by the Naval Inspector between the vessel and the shore ready for immediate use at all times while the vessel is berthed alongside the Contractor's pier or in dry dock or on marine railway. All tanks under alteration or repair shall be cleaned, washed and steamed out by the Contractor as may be necessary and the Naval Inspector shall be furnished with a gas-free certificate before any work is done on a [fol. 37] tank. The Contractor shall maintain a fire watch on the vessel at all times which shall be satisfactory to the Naval Inspector.

(f) The Contractor shall place proper safeguards for the prevention of accidents, and shall put up and keep at night suitable and sufficient lights where necessary during the prosecution of the work and use its best efforts to prevent accidents or injury to persons or property.

(g) When the vessel is in the Contractor's custody and the temperature becomes as low as thirty-five (35) degrees Fahrenheit, the Contractor shall keep all pipelines, fixtures, traps, tanks, and other receptacles on the vessel drained to avoid damage from freezing, or if this is not practicable, the vessel shall be kept heated to prevent such damage. The vessel's stern tube and propeller hubs shall be protected from frost damage by applied heat through the use of a salamander or other proper means.

(h) The work shall, whenever practicable, be performed in such manner as not to interfer with the berthing and messing of naval personnel attached to the vessel under-

going repairs or alterations, and provision shall be made so that personnel assigned to duty on the vessel undergoing repairs, completion, alterations or additions shall have access to the vessel at all times, it being understood that such personnel will not interfere with the work or the Contractor's workmen.

(i) The Government does not guarantee the correctness of the dimensions, sizes and shapes given in any job order, sketches, drawings, plans or specifications prepared or furnished by the Government. The Contractor shall be responsible for the correctness of the shape, sizes and dimensions [fol. 38] of parts to be furnished hereunder other than those furnished by the Government.

(j) Any question regarding or arising out of the interpretation of a job order or plans or specifications thereunder or any discrepancy between the plans and specifications shall be determined by the Naval Inspector.

(k) While in dry dock or on marine railway the Commander of the vessel shall be responsible for the proper closing of all openings to the ship's bottom upon which no work is being done by the Contractor's workmen. The Contractor shall be responsible for the closing, before the

end of working hours, of all valves and openings upon which work is being done by its workmen when such closing is practicable. The Contractor shall keep the Commander of the vessel cognizant of the closure status of all valves and openings upon which the Contractor's workmen have been working.

(l) The Government will furnish materials, supplies, tools, equipment, plans and drawings and facilities and services as determined by the Naval Inspector.

(m) The Contractor shall indemnify and save harmless the Government and its agencies and instrumentalities, the vessel and the owner of the vessel, from all suits or actions and damages or costs of every name and description to which the Government and its agencies and instrumentalities, the vessel or the owner thereof may be subject or put by reason of injury (including death) to the person or [fol. 39] property of another arising or growing out of the

fault or negligence of the Contractor or any subcontractor, its or their servants, agents or employes.

Article 10.—Subcontracts

(a) Prior to the letting of each subcontract hereunder and the placing of each order for the purchase of direct materials hereunder the Contractor shall give the Naval Inspector notice of its intention of so doing, and shall comply with any and all requirements which may be imposed by the Naval Inspector as to the extent to which and the terms and conditions upon which such subcontract or order shall or may be made.

(b) In addition to such other requirements as may be imposed by the Naval Inspector or under the terms of this agreement every subcontract and order made by the Contractor in performance hereof shall contain provisions which will fulfill the requirements of Article 7, 10(a), 13, 19, 21, 23, 24, 25, 26, and 29 hereof to the extent the requirements of such articles are applicable.

(c) If work of a nature which is ordinarily done under a ship repair or alteration contract and materials in connection with such work are done or furnished for work hereunder, by a subcontractor (including a subcontractor which is affiliated with the Contractor) which has a ship repair, completion alteration or addition contract with the Government, all such work and materials shall be charged to the Government under this contract at a price not in excess of that payable for doing such work or furnishing such material if furnished directly to the Government under such other ship repair, completion, alteration or addition contract. If work is done by a subcontractor who has a [fol. 40] ship repair, completion, alteration or addition contract with the Government, the work shall, except as may be mutually agreed by the parties hereto, be done at rates not in excess of the rates payable under such contract.

Article 11.—Risk of Loss; Insurance

(a) The Government assumes the risk of loss of or damage (including, but not limited to loss or damage from negligence of whatsoever degree, of the Contractor's servants, employees, agents or subcontractors) to vessels, title

to which is in the Government, and the equipment, movable stores and cargo of such vessels, and all materials or equipment in the possession of the Contractor, title to which is in the Government. Unless otherwise agreed in writing, the Contractor's aggregate liability with respect to vessels, title to which is not in the Government, shall in no event exceed the sum of $300,000, for each vessel, its equipment, movable stores and cargo, and the Government assumes any

liability of the Contractor for loss or damage thereto in excess of such sum. The Government shall secure the issuance by the War Shipping Administration under Public Law 17, 78th Congress of a policy or policies of insurance insuring the Contractor, in excess of such sum, on War Shipping Administration form "Warship-Repair".

The Cost to the Contractor of all ship repairer's legal liability insurance in excess of that indemnifying the Contractor against the liability provided for above shall be deducted in determining the amount of the Contractor's indirect expense under Article 5 hereof. The Chief of [fol. 41] the Bureau of Ships may require the Contractor to provide evidence of valid and satisfactory insurance in an amount equal to the sum set forth above, or otherwise agreed upon as above provided, with respect to each vessel, title to which is not in the Government, indemnifying the Contractor against liabilities for loss or damage to the vessel or its equipment, movable stores or cargo.

The Contractor shall procure and thereafter maintain insurance in such form, in such amounts, and at such rates as may be required or approved by the Chief of the Bureau of Ships insuring against the Contractor's third party liability for loss, damage or injury (including death) to a person or property of another (other than liability for loss of or damage to vessels being repaired under a ship repair, completion, alteration or addition contract with the Government and their respective equipment, movable stores and cargo and other than liability to employees of the Contractor or a subcontractor) arising out of performance by the Contractor hereunder. The Government shall cause the War Shipping Administration to issue a policy or policies

of insurance insuring the Contractor against such third party liability arising out of or in connection with work done hereunder at a location other than the plant in an amount not exceeding the difference between the insurance against such third party liability otherwise obtained by the Contractor and $ *None Required.*

(b) As soon as practicable after the occurrence of any event from which the obligation of the Government to hold the Contractor harmless against loss, expense, or liability might arise, written notice of such event shall be given by the Contractor to the Government, which notice shall con- [fol. 42] tain full particulars of such event. If claim is made or suit is brought thereafter against the Contractor as the result or because of such event the Contractor shall immediately deliver to the Government every demand, notice, summons, or other process received by it or its representatives.

(c) The Contractor shall cooperate with the Government and, upon the Government's request, shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits; and the Government shall pay to the Contractor the expense, other than the cost of maintaining the Contractor's usual organization, incurred in so doing. The Contractor shall not, except at its own cost, voluntarily make any payment, assume any obligation or incur any expense other than shall be imperative for the protection of the vessel or vessels at the time of said occurrence of such event.

(d) This undertaking of the Government to hold the Contractor harmless against loss, expense, and liability, as herein provided, shall not create or give rise to any right, privilege, or power, in any person or organization, except the Contractor, nor shall any person or organization be or become entitled to join the Government as a co-defendant in any action against the Contractor brought to determine the Contractor's liability or for any other purpose; provided, however, that as to any risk borne or assumed by the Government through this undertaking above set forth, the Government shall be subrogated to any claim, demand or cause of action against third persons or organizations [fol. 43] which exist in favor of the Contractor, and the

Contractor shall, if required, forthwith execute formal assignments or transfers of such claims, demands or causes of action.

Article 12.—Guarantees

(a) The Contractor shall promptly repair or replace any damage to or defect in the vessel, its machinery or equipment resulting from or becoming apparent during the course of any dock trial or sea trial given the vessel hereunder, which damage or defect is determined by the Naval Inspector to be due to faulty design or workmanship on the part of the Contractor, or to faulty material furnished by the Contractor. The Contractor shall be paid ten-elevenths (10/11) of the amount provided in paragraph (a) of Article 5 hereof for effecting such repair or replacement.

(b) In case any work done or material furnished under this contract on or for any vessel or the equipment thereof shall, within sixty (60) days from the date of completion of all work thereon by the Contractor, prove defective or deficient, except as a result of ordinary wear and tear, such defects or deficiencies shall as required by the Government be corrected and repaired by the Contractor at its plant or at any other plant of the Contractor to the satisfaction of the Naval Inspector. The Contractor shall be paid for effecting such correction and repair ten-elevenths (10/11) of the amount provided in paragraph (a) of Article 5 of the contract in effect at the plant where such corrections and repairs are made.

[fol. 44] Article 13.—Title

(a) Title to all material and equipment to be incorporated in the vessel or its equipment or to be used in doing any work hereunder or in connection therewith shall vest in the Government as payment is made therefor by the Government or by the Contractor, or upon delivery thereof to the Government or to the Contractor, whichever of said events shall first occur.

(b) The Contractor shall, as soon as practicable, identify any property which is to become a part of the vessel by

marking or segregation in such a way as to indicate ownership thereof by the Government and its allocation to the vessel.

(c) Nothing contained in this Article shall relieve the Contractor of any of its duties or obligations under this contract or constitute any waiver of the Government's rights to require fulfillment of all of the terms hereof.

Article 14.—Liens

The Contractor shall pay all costs and expenses incident to any work performed by it or for its account, and shall not have any right, power or authority to and shall not create, incur, suffer or permit to be placed or imposed upon any vessel being repaired, its hull, engines, tackle, apparel and furniture of all kinds, any maritime lien or other lien or any encumbrance or charge in any way arising from any act or omission of the Contractor, or to incur any debt, obligation or charge upon the credit of the vessel. The Contractor shall, orally or in writing, inform all persons dealing with it of the provisions of this paragraph.

[fol. 45] Article 15.—Transfer or Assignment of Contractor's Claims

(a) Neither this contract, nor any interest herein except as otherwise provided in this Article, shall be transferred by the Contractor to any other party or parties.

(b) Claims for moneys due or to become due to the Contractor from the Government arising out of this contract may be assigned to any bank, trust company, or other financing institution, including any Federal lending agency. Any such assignment shall cover all amounts payable under this contract and not already paid, shall not be subject to further assignment, and shall not be made to more than one party, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in the financing of this contract. In the event of any such assignment, the assignee thereof shall file writ-

ten notice of the assignment together with a true copy of the instrument of assignment with (1) the General Accounting Office of the Government, (2) the Chief of the Bureau of Ships, (3) the surety or sureties upon the bond or bonds, if any, in connection with this contract, and (4) the disbursing officer designated to make payments under this contract.

(c) Payments to an assignee of any claims arising under this contract shall not be subject to reduction or set-off for any indebtedness of the Contractor to the Government arising independently of this contract.

[fol. 46] (d) Information contained in plans, specifications, or any similar document, relating to work under this contract and marked "Secret", "Confidential", or "Restricted", shall not, in connection with assignment of any claim under the contract, be communicated, transmitted, or disclosed to any person not otherwise entitled to receive it, except with the prior consent of the Chief of the Bureau of Ships in each instance.

Article 16.—Patents

(a) The Contractor shall hold and save the Government, its officers, agents, servants, and employees, harmless from patent liability of any nature or kind, including costs and expenses, for or on account of any patented or unpatented invention made or used in the performance of this contract, including the use or disposal thereof by or on behalf of the Government; provided, that the foregoing shall not apply to inventions covered by applications for United States Letters Patent which, during the term of this contract, are being maintained in secrecy under the provisions of Title 35, U. S. Code (1940 ed.), section 42, as amended; provided further, that this Article is not, and shall not be construed to be, applicable to any infringement of United States Letters Patent which results from the Contractor complying with specific written instructions furnished by the Government, or where infringement is occasioned by the use of an apparatus patent due to the fabrication, installation, or operation of apparatus in accordance with plans or specifications furnished to the Contractor by the Government

or from the use or disposition of material or apparatus furnished to the Contractor by the Government.

[fol. 47] (b) The Contractor shall promptly notify the Government in writing of any known infringement and all claims of infringement relating to this contract that may be brought to the Contractor's attention; and in case of litigation on account thereof, the Contractor shall assist the Government at the latter's expense, save for services of the Contractor's employees, in furnishing such evidence as to the use of patents and other matters of fact as may be required by the Government in such litigation.

15

Article 17.—Stipulations Under Walsh-Healey Act

There is hereby incorporated herein by reference the representations and stipulations pursuant to Public Act No. 846, Seventy-Fourth Congress, as set forth in Article I of Part I of Regulations No. 504, issued by the Secretary of Labor pursuant to such Act, as from time to time amended.

Article 18.—Workmen's Compensation Insurance

During the life of this contract the Contractor will provided and maintain, for all employees of the Contractor engaged in work under this contract, such Workmen's Compensation insurance or such other protection for employees as may be required by Federal or State statutes in the jurisdiction in which such work is performed, under the direction of the Contracting Officer.

Article 19.—Nonrebate

The Contractor shall comply with the regulations of the Secretary of Labor under the Copeland Act of June 13, 1934 (40 U. S. Code (1940 ed.) secs. 276b and 276c), [fol. 48] entitled "Regulations Applicable to Contractors and Subcontractors on Public Building and Public Work and on Building and Work Financed in Whole or in Part by Loans or Grants from the United States" (7 F. R. 687, 925, 2591, 3358) and any amendments or modifications thereof, and shall insert in subcontracts appropriate pro-

visions requiring compliance therewith by all subcontractors subject thereto, except as the Secretary of Labor may specifically provide for reasonable limitations, variations, tolerances, and exemptions from the requirements of said regulations.

Article 20.—Convict Labor

The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article 21.—Nondiscrimination in Employment

(a) The Contractor hereby agrees that, in performing the work required by this contract, it will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.

(b) The Contractor hereby agrees that a provision identical with paragraph (a) above will be included in all of its subcontracts.

(c) For the purpose of this article, subcontracts shall be deemed to include all purchase orders and agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of this contract, except purchase orders or agreements for the furnishing of standard commercial articles or raw materials.

[fol. 49] Article 22.—Plant Protection

(a) In addition to taking the ordinary precautions heretofore adopted by the Contractor for the guarding and protection of its plant and work, the Contractor shall provide, as may be required or approved by the Contracting Officer, special plant protection such as additional equipment, devices and watchmen for the protection of its plant and property and the work in process for the Government against espionage, sabotage or enemy action.

(b) When directed by the Naval Inspector, the Contractor shall deliver to the Naval Inspector a list of items of additional plant protection deemed necessary for adequate plant protection, together with an estimate of the cost thereof. Such items of additional plant protection shall be

those required by the circumstances under which this contract is being performed and must be directed against espionage, acts of war and acts of enemy aliens. The Contractor must provide without charge protection against the elements, including storms and high water, and take the precautions usually taken as prudent measures in shipbuilding or manufacturing plants against fire, theft, and other risks such as occur in the ordinary conduct of business.

(c) If approved by the Naval Inspector, such list, together with the estimate of cost and the comments of the Naval Inspector, shall be forwarded to the Contracting Officer in triplicate for approval. If the Contracting Officer disapproves the proposed expenditures for special plant protection, the Contractor and the Naval Inspector will be so informed by letter. If such proposed expenditures are approved, the Contracting Officer shall issue a letter author- [fol. 50] izing such special plant protection. The cost to the Contractor, as determined by the Special Board on Changes of the Navy Department, of all safeguards so required or approved shall be reimbursed to the Contractor. Such costs shall not include any allowance on account of overhead expense except shop overhead charges incident to the construction or installation of such devices or equipment.

(d) Upon payment by the Government of the cost to the Contractor of any equipment or device required or approved under paragraph (a) of this Article, title thereto shall vest in the Government, and the Contractor shall comply with the instructions of the Navy Department respecting the identification and disposition thereof. No part or item of any such devices or equipment shall be or become a fixture by reason of affixation to any realty not owned by the Government.

Article 23.—Disclosure of Information

(a) It is understood that the work contracted for hereunder relates to and is connected with the national defense (the prosecution of the war effort), and it is agreed: (1) That no information relating to the work under this contract shall be communicated, transmitted, or disclosed to any person not entitled to receive it; and (2) that the

Contractor shall be responsible for safeguarding matters within the Contractor's control identified by the Navy Department as Secret, Confidential or Restricted.

(b) Information contained in the plans and specifications may be disclosed to the officers, agents, or employees of the Contractor to the extent that such disclosure is essential [fol. 51] to the performance of this contract, subject to any restrictions which may be imposed by the Contracting Officer of the Naval Inspector. Information contained in the plans and specifications may be disclosed to officers, agents, or employees of corporations, partnerships or persons undertaking the performance of subcontracts or purchase orders made or placed under this contract only if the Contracting Officer or the Naval Inspector shall consent to such disclosure.

17

(c) It is further understood that disclosure of information relating to the work contracted for hereunder to any person not entitled to receive it, or failure to safeguard all matters within the Contractor's control identified by the Navy Department as Secret, Confidential or Restricted, may subject the Contractor, his or its agents, employees, and subcontractors, to criminal liability under the laws of the United States, including Title I of an Act approved June 15, 1917 (Public No. 24, 65th Congress; 40 Stat. 217), as amended by an Act approved March 28, 1940 (Public No. 443, 76th Congress; 54 Stat. 79) (50 U. S. Code (1940 ed.) Chap. 4), and the provisions of an Act approved January 12, 1938 (Public No. 418, 75th Congress: 52 Stat. 3; 50 U. S. Code (1940 ed.) 45-45d), as supplemented by Executive Order No. 8381 dated March 22, 1940.

Article 24.—Alien Employees of Contractor and Subcontractor

(a) The plans and specifications under this contract are identified by the Navy Department as Confidential within the meaning of Section 11 of 54 Stat. 676 (Public No. 671, [fol. 52] 76th Congress), and it is agreed that no aliens in the employ of the Contractor shall be permitted to have access to the plans or specifications or the work under the

contract or to participate in the contract trials unless the written consent of the Secretary of the Navy has first been obtained.

(b) In each subcontract or purchase order which the Contractor may make or place under this contract there shall be included a stipulation that no aliens in the employ of the corporation, partnership, or other person undertaking the performance of the subcontract or purchase order shall be permitted to have access to the plans or specifications, or the work under the contract, or to participate in the contract trials, unless the written consent of the Secretary of the Navy has first been obtained; provided, that such stipulation need not be included in any subcontract or purchase order for standard or commercial products procured under specifications which will not disclose the nature or character of the subject matter of this contract or any other information relative thereto which has been identified by the Government as Secret, Confidential or Restricted; provided further, that such stipulation need not be included in a subcontract or purchase order if the Contracting Officer or the Naval Inspector shall consent to the omission of such stipulation from such subcontract or purchase order or to the inclusion of a different stipulation therein.

Article 25.—Report of Espionage, Sabotage or Subversive Activities

(a) The Contractor agrees that it will immediately submit a confidential report to the Navy Department or its duly authorized representatives, with copies to such other [fol. 53] Government agencies as the Navy Department or its duly authorized representatives may designate, whenever it has information indicating (1) that any of its employees may be engaged in subversive activity at any place or (2) that an active danger of espionage or sabotage exists at any plant, factory or site at which work under this contract is being performed or at which material acquired, fabricated or manufactured in connection with the performance of this contract is stored. The reports shall contain a complete statement of such information. The Contractor agrees that it will instruct its personnel to submit any

information coming to their attention with respect to the foregoing.

18

(b) The Contractor agrees that it will, whenever directed by duly authorized representatives of the Navy Department, submit any and all information which the Contractor may have concerning any of its employees engaged in work at any plant, factory or site at which work under this contract is being performed.

(c) The Contractor agrees that it will refuse to employ, or if already employing will forthwith discharge from employment and will exclude from any plant, factory or site at which work under this contract is being performed, any person or persons whom the Secretary of the Navy or his duly authorized representatives, in the interest of security against espionage, sabotage or subversive activity may designate.

(d) In each subcontract or purchase order which the Contractor may make or place under this contract the [fol. 54] Contractor shall include stipulations which shall conform substantially to the language of the preceding paragraphs of this Article; provided, that such stipulations need not be in any subcontract or purchase order for standard or commercial products procured under specifications which will not disclose the nature or character of the subject matter of this contract; provided further, that such stipulations need not be included in a subcontract or purchase order if the Contracting Officer or the Naval Inspector shall consent to the omission of such stipulations or the inclusion of different stipulations.

Article 26.—Officials Not to Benefit

No member of or delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 27.—Covenant Against Contingent Fees

The Contractor warrants that it has not employed any person to solicit or secure this contract upon any agree-

ment for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies [fol. 55] maintained by the Contractor for the purpose of securing business.

Article 28.—Disputes

Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract or on any job order, or plans or specifications, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail a copy thereof to the Contractor by registered mail. Within thirty (30) days from said mailing the Contractor may appeal to the Secretary of the Navy, whose decision or that of his duly designated representative, or representatives, or board shall be final and conclusive upon the parties hereto. No claim by the Contractor arising under this contract with respect to any vessel shall be considered unless submitted in writing within six (6) months from the date of completion of the repairs and alterations on such vessels or her equipment by the Contractor, or within such longer period as the Secretary of the Navy may approve in writing. Pending decision of a dispute hereunder the Contractor shall diligently proceed with the performance of this contract.

19

Article 29.—Renegotiation

Pursuant to Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended:

(a) Upon the written request of the Secretary of the Navy at such period or periods when in the judgment of [fol. 56] the Secretary of the Navy the profits accruing under this contract can be determined with reasonable cer-

tainty, the contract price shall be renegotiated to eliminate therefrom such amount as is found as a result of such renegotiation to represent excessive profits.

(b) Any profits found as a result of such renego-tion to be excessive and not eliminated through reductions in the contract price hereunder or otherwise shall, as the Secretary of the Navy may direct, (1) be retained by the Government from amounts otherwise due the Contractor, or (2) be repaid by the Contractor to the Government, if such excessive profits have been paid to the Contractor.

(c) The Contractor shall require the insertion of the following provisions in each subcontract described in subparagraph (f)(2)(ii) of this Article and in each subcontract for an amount in excess of $100,000 described in subparagraph (f)(2)(i) of this Article, directly entered into by the Contractor under this contract.

(1) Upon the written request of the Secretary of the Navy at such period or periods when in the judgment of the Secretary the profits accruing under this contract can be determined with reasonable certainty, the contract price shall be renegotiated by the Secretary of the Navy and [1] ..... to eliminate therefrom such amount as is found as a result of such renegotiations to represent excessive profits.

(2) Any profits found as a result of such renegotiation to be excessive and not eliminated through reductions in the contract price hereunder or otherwise, shall, as the Secretary of the Navy may direct, (i) be retained by [2] ..... for the Government, or (ii) be repaid by [1] ..... to the Government, if [fol. 57] such excessive profits have been paid to [1] .....

(3) [2] ..... is hereby relieved from any liability to [1] ..... on account of any amount retained or repaid pursuant to paragraph (2) above.

(4) [1] ..... shall, upon the direction of the Secretary of the Navy, require the insertion in any

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[1] Subcontractor.

[2] Contractor.

subcontract made hereunder, of contract provisions conforming substantially to the provisions of this Article.

(5) Any renegotiation under this Article shall be conducted pursuant to the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

(6) The Contractor shall also require the insertion of the definitions which are contained in subparagraph (f) of this Article in each such subcontract.

(d) Any profits under any subcontract hereunder which are found as a result of renegotiation to be excessive and which the Contractor is directed by the Secretary of the Navy to withhold from payments otherwise due the subcontractor and actually unpaid at the time of receipt of

such direction, shall, as the Secretary of the Navy may direct, (1) be retained by the Government from amounts otherwise due the Contractor, or (2) be repaid by the Contractor to the Government.

(e) Any renegotiation under this Article shall be conducted pursuant to the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

(f) For the purpose of this Article,

[fol. 58] (1) the terms "Secretary of the Navy" and "Secretary" shall be deemed to include any authorized representative of the Secretary of the Navy, and

(2) the term "subcontract" means (i) any purchase order or agreement to perform all or any part of the work or to make or furnish any article, required for the performance of any other contract or subcontract, unless exempted from the provisions of Section 403, as amended, under subsection (i) thereof, or (ii) any contract or arrangement (other than a contract or arrangement between two contracting parties, one of which parties is found by the Secretary of the Navy to be a bona fide executive officer, partner, or full-time employee of the other contracting party), (A) any amount payable under which is contingent upon the procurement of a contract or contracts with the

Navy Department or of a subcontract or subcontracts thereunder; or determined with reference to the amount of such a concontract or subcontract or such contracts or subcontracts or (B) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with the Navy Department or a subcontract or subcontracts thereunder. The term "article", as used in this definition, includes any material, part, assembly, machinery, equipment, or other personal property.

Article 30.—Cancellation and Termination

(a) Cancellation:

Any job order hereunder may be cancelled in whole or in part at the option of the Naval Inspector by written [fol. 59] notice to the Contractor. In the event of such cancellation, the Contractor shall:

(i) Comply with such notice by stopping work under such job order at the time and to the extent required by such notice and by cancelling material orders and subcontracts entered into for the performance of such job order;

(ii) Take such steps to protect the interests of the Government and with respect to the care and disposition of the material and equipment pertaining to such cancelled job order and the vessel, as may be necessary and, in addition, as such notice or the Naval Inspector may direct;

(iii) The Contractor shall be paid under Article 5 hereof (A) for work done and material furnished under such job order prior to stopping work under the notice of cancellation, for which the Contractor has not already been

paid pursuant to the provisions of this paragraph (a); and (B) all reasonable costs incurred in cancelling such material orders and subcontracts.

(b) The Naval Inspector may determine that a vessel shall be removed from the Contractor's plant or other premises where it is located. In such event, the Government shall have access to the Contractor's plant or other

premises to the extent necessary or convenient in making the vessel seaworthy and removing the vessel.

(c) Termination:

(i) This contract may be terminated by the Government in whole or in part whenever the Contracting Officer shall determine that termination is for the best interest of the [fol. 60] Government. Termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the cause of termination, the extent to which performance of the contract shall be terminated, and the date upon which termination shall become effective, which date will not be earlier than the date of the receipt of the Notice of Termination;

(ii) After receipt of the Notice of Termination, the Contractor shall:

(1) Terminate work on the contract on the date and to the extent specified in the Notice of Termination;

(2) Submit to the Naval Inspector within thirty (30) days after receipt of Notice of Termination, a list of all unperformed orders and subcontracts relating to this contract;

(3) Place no further orders for materials or equipment except as may be directed by the Naval Inspector;

(4) Cancel and terminate all orders and subcontracts not necessary for the performance of any work required to be performed under the Notice of Termination;

(5) Assign to the Government all of the right, title and interest of the Contractor under such orders or subcontracts as the Contracting Officer may direct;

(6) Transfer title to and deliver to the Government, in the manner and at the times directed by the Naval Inspector such of the plans, drawings, materials, fabricated parts, work in process and completed work relating to the performance of this contract, as the Contracting Officer may direct. Such items shall be covered by a job order prepared and executed as provided in Article 3 hereof;

[fol. 61] (7) Complete performance of such part of the contract as shall not have been terminated by the Notice of Termination; and

(8) Take such action as the Naval Inspector may direct

for the protection and preservation of the property in the possession of the Contractor and in which the Government has an interest.

(iii) After termination of this contract in the manner provided in this Article, the Government shall pay to Contractor, within a reasonable time after such termination, the following:

(1) The amount due the Contractor in accordance with Article 5 hereof under job orders for work done and materials furnished to the time of termination and for work and materials required by the Naval Inspector to be furnished after termination;

(2) Any reasonable expense incidental to termination under paragraph (ii) hereof, of orders or subcontracts;

(3) The reasonable cost of the preservation and protection of property required under paragraph (ii) hereof.

(iv) The obligation of the Government to make any of the payments required under paragraph (iii) hereof shall be subject to (1) any unsettled claims against the Contractor for labor or materials, (2) any claim which the Government may have against the Contractor, (3) deductions for any advance payments, unit payments, or partial payments made to the Contractor under or in connection with this contract, and (4) reasonable deductions by the Government on account of defects in the materials or workmanship of [fol. 62] completed or partially completed work hereunder or other defaults under this contract.

(v) Termination under this Article 30(c) shall affect the provisions of and obligations under this contract only to the extent specified in this Article or in the Notice of Termination or necessarily implied thereby and shall not affect any other rights or obligations which the parties hereto may have under contract or commonlaw or under any statute. The payments required by this Article 30(c) shall be in full satisfaction and constitute a discharge of all claims by the Contractor to damages or compensation arising out of termination except as otherwise expressly agreed. The Contractor shall give the Government a release or releases in such form as required by the Contracting Officer.

(vi) The Contractor shall have the right to terminate this contract by giving the Contracting Officer notice thereof in writing. The contract shall terminate forty-five (45) days after receipt of such notice by the Contracting Officer except with respect to all work on vessels which are delivered to the Contractor prior to the expiration of the aforementioned forty-five (45) days.

Article 31.—Definitions

For the purposes of this contract, the term "Naval Inspector" is defined as the authorized representative of the Chief of the Bureau of Ships, the term "Naval Cost Inspector" is defined as the officer in charge of the Cost Inspection Division of the Bureau of Supplies and Accounts; and the term, "Secretary of the Navy", "Chief of the Bureau of Ships", "Contracting Officer", "Naval Inspector", and [fol. 63] "Naval Cost Inspector" include in each case their respective successors and authorized representatives.

23

Article 32—Period of the Contract

Unless sooner terminated as herein provided, this contract shall within the limits of the appropriations available therefor remain in force during the continuance of the present war and for six months after the termination of the war.

Article 33

The following new subsection is added at the end of Article 5(a):

(vi) The increase in wages and related tax and insurance costs paid for work done under this contract as a direct result of a retroactive mandatory order of the War Labor Board, but without allowance for either profit or overhead.

The last paragraph of Article 5(d) is changed as follows:

(a) By substituting, in two places, the words and figures "one hundred-one hundred and ninth (100/109)" for the words and figures "ten-elevenths (10/11)".

(b) By substituting, in two places, the words and figures

"nine-one hundred and ninths (9/109)" for the words and figures "one-eleventh (1/11)".

Article 5(e) is changed as follows:

By substituting the words and figures "one hundred and nine-one hundredths (109/100)" for the words and figures "eleven-tenths (11/10)".

Article 9(c) is changed as follows:

[fol. 64] By substituting the words and figures "one hundred-one hundred and ninths (100/109)" for the words and figures "ten-elevenths (10/11)".

Article 12(a) and 12(b) are changed as follows:

By substituting the words and figures "one hundred-one hundred and ninths (100/109)" for the words and figures "ten-elevenths (10/11)".

In witness whereof, the parties hereto have executed this contract as of the day and year first above written.

The United States of America By [s] W. R. Gary, Contracting Officer, Bureau of Ships, Navy Department; Graham Ship Repair Co. (Contractor), By [s] W. C. Graham, W. C. Graham, General Partner.

Two witnesses as to Contractor:
/s/ E. B. MacDonald
E. B. MacDonald
/s/ James Close
James Close

24

State of California, County of San Francisco, ss:

On this 6th day of January, 1945, before me personally appeared W. C. Graham, to me known, who, being by me first duly sworn, did depose and say that he is a general partner in the firm of Graham Ship Repair Co.; that said firm consists of himself and A. Bourke, C. Y. Cobb, J. P. Cobb, Metro Adams, Frank Hansen and Louis A. Clausell, all [fol. 65] limited partners; and that he executed the fore-

going instrument on behalf of said firm for the uses and purposes stated herein.

/s/ Dorothy Berger, Dorothy Berger, Notary Public in and for the County of San Francisco, State of California, (Notarial Seal) My Commission expires October 4, 1945.

25

Schedule "A"

Rates for drydock, marine railway, floating derrick and tugboat services, referred to in Article 5(a)(iv).

None

26

Exhibit 1(A.) to Petition

Navships 2695A

April 45.

Agreement Amending Contract

NObs 10230. (Navy)

This negotiated agreement entered into as of the 1st day of April, 1945, by and between The United States of America (hereinafter called the "Government"), represented by the Contracting Officer executing this agreement and Graham Ship Repair Co., a partnership organized and existing under the laws of the State of California (hereinafter called the "Contractor"),

[fol. 66] Witnesseth:

Whereas, the parties hereto entered into Contract NObs 10230 for the repair, completion, alteration of or additions to vessels (hereinafter called the "Contract"); and

Whereas, the Contracting Officer has determined that this agreement will facilitate the prosecution of the war; and

Whereas, the parties desire to amend the Contract in the respect hereinafter set forth;

Now, therefore, the parties hereto mutually agree as follows:

Article I. The Contract is hereby amended in the following respects (the Article numbers refer to the Article numbers in the Contract, as amended):

1. The entire text of Article 6 (b) is amended to read as follows:

"(b) At the end of any year or within sixty (60) days after receipt of the Contractor's report under paragraph (a) of this Article, the Contracting Officer may demand that the Contractor repay, and the Contractor agrees to repay any profits earned hereunder during such year which are deemed by the Contracting Officer to be in excess of a reasonable profit; provided, that no such demand will be interpreted to require the Contractor to repay an amount which would reduce the Contractor's profit to less than the following percentages of the Contractor's aggregate costs under all the master time and material vessel repair contracts between the Contractor and the War Department, the Navy Department, and the Administrator, War Shipping Administration, respectively:

"(i) If costs under said contracts during such year aggregate no more than $4,000,000, then in excess of 7% of costs;

[fol. 67] "(ii) If costs under said contracts during such year aggregate more than $4,000,000 but not more than $25,000,000, then in excess of 7% of costs for the first $4,000,000 in costs and in excess of 6½% of costs for the balance of the costs; and

"(iii) If costs under said contracts during such year aggregate more than $25,000,000, then in excess of 6½% of costs for all costs, including the first $4,000,000.

"The Contractor's costs under this contract and under said contracts shall exclude from cost and billing for these purposes the cost of furnishing special plant protection under Article 22 hereof; all monies paid by the Contractor to the Government or any of its agencies for premiums of policies of insurance covering any risk, hazard, or liability of the Contractor arising out of or in connection with this Contract; the amount paid to the Contractor for furnishing temporary facilities, tools, and equipment and services in connection therewith for which the Contractor has been

compensated under Article 5(a)(iii); all rentals paid to the Government under a Navy Department facilities contract or a Maritime Commission or War Shipping Administration contract or lease; and the amount of all subcontracts with subcontractors affiliated with the Contractor and which have ship repair, completion, alteration, and addition contracts with the Government, and shall be determined in accordance with the pamphlet 'Explanation of Principles for Determination of Costs under Government Contracts,' printed by the U. S. Government Printing Office, April 1942, except paragraph 47 thereof; and provided further that nothing in this paragraph, or elsewhere in this contract, except as provided in Article 29(c) hereof, shall be construed to limit or restrict the right of the Gov- [fol. 68] ernment to renegotiate pursuant to Article 29 of this contract or Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, or to affect the amount recoverable in the event of such renegotiation. The Contracting Officer shall certify to the Secretary of the Navy as to the action taken under this paragraph."

2. The entire text of Article 29 is amended to read as follows:

"(a) This contract shall be deemed to contain all the provisions required by subsection (b) of the Renegotiation Act, as amended by Section 701 of the Revenue Act of 1943 (Public Law 235, 78th Congress, enacted February 25, 1944).

"(b) In compliance with said subsection (b) of the Renegotiation Act, the Contractor shall insert in the subcontracts specified in said subsection (b) either the provisions of paragraphs (a) and (b) of this Article or the provisions required by said subsection (b).

"(c) The Secretary of the Navy has found and determined that, in his opinion, the provisions of this contract are, without reference to the exempted provisions of the Renegotiation Act (Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended), otherwise adequate to prevent excessive profits during the year beginning April 1, 1945, and ending March 31, 1946.

Accordingly, notwithstanding Article 29(a) hereof, and pursuant to the authority delegated to the Secretary of the Navy by the War Contracts Price Adjustment Board under date of November 10, 1944, and the authority delegated to the Contracting Officer by the Secretary of the Navy, the Contracting Officer has and does hereby exempt this contract from all of the provisions of the said Renegotiation Act except subsections (b) (3) and (b) (4) thereof, [fol. 69] for the period beginning April 1, 1945, and ending March 31, 1946. This exemption does not extend to any subcontracts, agreements or purchase orders made or placed for the performance of this contract, and accordingly does not affect the provisions of Article 29(b).

3. The following new paragraph is added to Article 30(c):

"(vii) In addition to the right to terminate under Article 30(c)(vi), the Contractor may, at any time when in its judgment it is probable that a sharp and permanent decline in the work load either has occurred or is imminent, give written notice to the Contracting Officer effective fifteen (15) days after its receipt, that it elects to perform all work hereunder which is incomplete on the effective date of the notice and such additional work as may be assigned to the Contractor pursuant to Article 2 hereof for forty-five (45) days thereafter, on a cost-plus-a-fixed-fee basis. In the event of such election by the Contractor (i) the fixed fee to be paid to the Contractor for such incomplete and new work shall be fixed by the Contracting Officer on a basis which he shall determine to be fair and equitable after the Contractor shall have been given an opportunity to be heard by the Contracting Officer; (ii) the Contractor's costs for the completion of such incomplete and new work shall be determined as provided in the pamphlet 'Explanation of Principles for Determination of Costs under Government Contracts' printed by the U. S. Government Printing Office, April 1942, except Paragraph 47, provided that Paragraphs 9 and 44 thereof shall be modified to require the deduction of all cash discounts (without excepting 1% cash discounts) and the costs shall be subject to the limitations and exclusions described in that pamphlet; and

[fol. 70] (iii) except as they conflict with the express provisions of this Paragraph, all of the terms of this contract shall remain in full force and effect with respect to the performance of such incomplete and new work.

"In addition, the Contractor and the Contracting Officer by mutual agreement may convert this contract so that all incomplete and new work shall be performed on such other basis as they may agree, provided that the failure to agree on such other basis shall not be a dispute within the meaning of Article 28 hereof. Notwithstanding any other provision of this contract, if the Contractor shall elect to perform such incomplete and new work on a cost-plus-a-fixed-fee basis or agree to perform such work on some other basis, the period for which any abatement of charges is determined under the provisions of Article 6(b) and the period for which this contract has been exempted from the Renegotiation Act under the provisions of Article 29(c) shall both cease on the effective date of the notice of election or on the effective date of such mutual agreement, as the case may be, and shall not again become operative until such time, if any, as the Contracting Officer shall assign new work to the Contractor on a time and material basis under this contract.

"In the event that the Contractor, after service of such notice of election, shall again be assigned work by the Contracting Officer on a time and material basis under this contract, the billing rate for such work shall be determined by mutual agreement and, in the event no such agreement is reached, the matter shall be referred to the Contracting Officer as a disputed question of fact under Article 28 hereof."

[fol. 71] 4. The last paragraph of Article 5(d) is changed as follows:

(a) By substituting, in two places, the words and figures "one hundred-one hundred and sevenths (7/107)" for the words and figures "one hundred-one hundred and ninths (100/109)".

(b) By substituting, in two places, the words and figures "seven-one hundred and sevenths (7/107)" for the words and figures "nine-one hundred and ninths (9/109)".

5. Article 5(e) is changed as follows:

By substituting the words and figures "one hundred and seven-one hundredths (107/100)" for the words and figures "one hundred and nine-one hundredths (109/100)".

6. Article 9(c) is changed as follows:

By substituting the words and figures "one hundred-hundred and sevenths (100/107)" for the words and figures "one hundred-one hundred and ninths (100/109)".

7. Article 12(a) and 12(b) are changed as follows:

By substituting the words and figures "one hundred-one hundred and sevenths (100/107)" for the words and figures "one hundred-one hundred and ninths (100/109)".

Article II. For the current year only the repayment which may be demanded by the Contracting Officer and which shall be made by the Contractor, under the provisions of Article 6(b), shall be computed as follows:

(a) (i) the applicable provisions of Article 6(b) as existing prior to the effective date of this amending agreement shall apply to the period ending March 31, 1945;

[fol. 72] (ii) for the period beginning April 1, 1945 and ending with the end of the current year the applicable provisions shall be those of Article 6(b) as existing after the effective date of this amending agreement;

(iii) the Contractor shall submit a report for the current year within sixty (60) days after its end and the Contracting Officer may make demand for repayment with respect to such year at that time or within sixty (60) days after receipt of such report.

(b) Notwithstanding the provisions of (a) of this Article II, the period for which the aggregate costs referred to in subsections (i), (ii), and (iii) of section (b) of Article I of this amending agreement shall be the entire current year.

Article III. This amendment to the Contract shall be effective as of April 1, 1945.

Article IV. Except as herein and hereby amended, all of the terms and conditions of the Contract shall remain in full force and effect.

In witness whereof, the parties hereto have executed this agreement as of the day and year first above written.

The United States of America By [s] W. R. Gary, Contracting Officer, Bureau of Ships, Navy Department. Graham Ship Repair Co., Contractor, By [s] W. C. Graham, General Partner.

[fol. 73] Two Witnesses as to Contractor: /s/ Russell W. Small, /s/ L. C. Ebeling.

I, ..., certify that I am the .....

of the Corporation named as Contractor herein; that .....

who signed this agreement on behalf of the Contractor was then ..... of said Corporation; and that this agreement was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate power.

.....

(Corporate Seal)

(P)

EXHIBIT 2 TO PETITION

Assignment

Know all men by these presents:

That the undersigned, Graham Ship Repair Co., a Limited Partnership composed of Warren C. Graham, general partner, and Agnes B. Graham, limited partner, with its principal place of business at 501 - 1st Street, in the city of Oakland, State of California (hereinafter called "Assignor"), for and in consideration of the sum of $1.00 and other good and valuable consideration to it in hand paid, receipt of which is hereby acknowledged, has sold, transferred, assigned and set over and by these presents does sell, transfer, assign and set over unto Central Bank, a banking corporation organized and existing under and by virtue of the laws of the State of California, having its [fol. 74] principal place of business at Fourteenth Street and Broadway, Oakland, California (hereinafter called

"Bank"), its successors and assigns, any and all amounts now due or owing, or which may hereafter be or become due or owing or remain unpaid at any time or times from The United States of America, or from any Department, Agency or Commission thereof, to the Assignor under and pursuant to the terms of a certain contract dated December 30, 1944 between the United States of America, Navy Department (Bureau of Ships) and the Assignor, being Contract Number NObs-10230 including all moneys due or which may hereafter be or become due or owing or remain unpaid at any time or times for extras or changes, or under any options exercised by said Navy Department (Bureau of Ships), or under any other provisions of said contract.

The undersigned constitutes and appoints the said Bank, its successors and assigns, its true and lawful attorney, irrevocably, with full power of substitution for the undersigned and in its name to ask, require, demand and receive of the said United States of America or from any Agency, Department or Commission thereof, the said moneys herein assigned, and on non-payment thereof to sue for, recover and receive the same, and on payment thereof to give sufficient releases, receipts and discharges thereof.

This Assignment is made pursuant to the Assignment of Claims Act of 1940 and under the provisions of the aforementioned contract, and payments due under said contract and hereunder to said Bank shall not be subject to reduction or set-off for any indebtedness of the Assignor to The United States arising independently of the said contract; [fol. 75] and the undersigned specifically authorizes and directs The United States of America to make such payments as and when due under said contract to said Bank, as hereinabove provided.

And the said Assignor does hereby represent and warrant unto said Bank that the undersigned has not heretofore alienated or assigned said contract or any rights or interest therein or thereto or to the payments due or to become due thereunder.

In witness whereof the undersigned has caused this As-

signment to be duly executed and attested..... this 31st day of January, 1945.

Graham Ship Repair Co. by /s/ Warren C. Graham
General Partner.

Subscribed and sworn to before me this 31st day of January, 1945, at Oakland, California:

/s/ L. M. Guesemer Notary Public My commission expires: May 23, 1948.

EXHIBIT 3 TO PETITION

Notice of Assignment

Date January 31, 1945

To: Contracting Officer
Bureau of Ships
Navy Department
Washington, D. C.

Subject: Contract Number NObs-10230
[fol. 76] Made by the United States of America
Navy Department
Bureau of Ships

With Graham Ship Repair Co.

(Name of Contractor)

501 - 1st Street
Oakland, California

(Address of Contractor)

For the repair or alteration of vessels at Oakland, California.

Dated: December 30, 1944.

Please take notice that moneys due or to become due under the contract described above has been assigned to the undersigned pursuant to the provisions of the Assignment of Claims Act of 1940 (Public No. 811, 76th Congress), approved October 9, 1940.

A true copy of the instrument of assignment is attached hereto.

Payments due or to become due under such contract should be made to the assignee.

Please return to the undersigned the three (3) enclosed copies of this notice with appropriate notations showing the date and hour of receipt and duly signed by the person acknowledging receipt on behalf of the addressee.

Very truly yours,

Central Bank by /s/ M. M. Maze, Vice President, Fourteenth Street and Broadway, Oakland, California Zone 4

[fol. 77] Receipt is hereby acknowledged of the above notice and a copy of the abovementioned instrument of assignment. These were received at 10 A. M. on 8 February, 1945.

/s/ (Signature Illegible) on behalf of (Name Illegible), Contracting Officer, Bureau of Ships. (Name and title of Addressee of Notice).

EXHIBIT 4 TO PETITION

Notice of Assignment

Date January 31, 1945

To: Captain J. F. Kutz
Disbursing Officer
300 U. S. Appraisers Bldg
San Francisco, Calif

Subject: Contract Number NObs-10230
Made by the United States of America
Navy Department
Bureau of Ships

With Graham Ship Repair Co.

(Name of Contractor)

501 - 1st Street
Oakland, California

(Address of Contractor)

For the repair or alteration of vessels at Oakland, California.

Dated: December 30, 1944.

Please take notice that moneys due or to become due under the contract described above has been assigned to [fol. 78] the undersigned pursuant to the provisions of the Assignment of Claims Act of 1940 (Public No. 811, 76th Congress), approved October 9, 1940.

A true copy of the instrument of assignment is attached hereto.

Payments due or to become due under such contract should be made to the assignee.

Please return to the undersigned the three (3) enclosed copies of this notice with appropriate notations showing the date and hour of receipt and duly signed by the person acknowledging receipt on behalf of the addressee.

Very truly yours,

Central Bank, By /s/ M. M. Maze, Vice President, Fourteenth Street and Broadway, Oakland, California, Zone 4.

Receipt is hereby acknowledged of the above notice and a copy of the abovementioned instrument of assignment. These were received at 2:00 P. M. on 14 February, 1945.

/s/ D. J. Kierulff, Lt. Comdr. (SC) USNR on behalf of District Disbursing Officer Twelfth Naval District. (Name and title of Addressee of Notice).

[fol. 79] EXHIBIT 5 TO PETITION

Notice of Assignment

Date January 31, 1945

To: General Accounting Office
Moses Building
Washington, D. C.

Subject: Contract Number NObs-10230
Made by the United States of America
Navy Department
Bureau of Ships

With Graham Ship Repair Co.
(Name of Contractor)

501 - 1st Street
Oakland, California
(Address of Contractor)

For the repair or alteration of vessels at Oakland, California.

Dated: December 30, 1944.

Please take notice that moneys due or to become due under the contract described above has been assigned to the undersigned pursuant to the provisions of the Assignment of Claims Act of 1940 (Public No. 811, 76th Congress), approved October 9, 1940.

A true copy of the instrument of assignment is attached hereto.

Payments due or to become due under such contract should be made to the assignee.

Please return to the undersigned the three (3) enclosed copies of this notice with appropriate notations showing the date and hour of receipt and duly signed by the person [fol. 80] acknowledging receipt on behalf of the addressee.

Very truly yours,

Central Bank, By /s/ M. M. Maze, Vice President, Fourteenth Street and Broadway, Oakland, California, Zone 4.

Receipt is hereby acknowledged of the above notice and a copy of the abovementioned instrument of assignment. These were received at ..... on Feb. 5, 1945.

/s/ Florence G. Harton on behalf of for Chief Contract Service Section, General Accounting Office.

(Name and title of Addressee of Notice).

EXHIBIT 6 TO PETITION

Comptroller General of the United States
Washington 25

May 18, 1950

B-72929

Central Bank of Oakland
c/o Llewellyn A. Luce, Esquire
937 Munsey Building
Washington 4, D. C.

Gentlemen:

Reference is made to your attorney's letter of April 10, 1950, and other correspondence, relative to your claim for $110,966.08, as assignee of amounts otherwise payable to the Graham Ship Repair Company, 501 First Street, Oak- [fol. 81] land, California, under contract NObs-10230, dated December 30, 1944, for services rendered by the contractor to the Department of the Navy.

By the terms of the subject contract the contractor agreed, under a "cost reimbursable basis," to perform such alterations or repairs as specified by the Department of the

Navy and in accordance with the respective job orders issued, on any vessels delivered to contractor during the life of the contract. It appears that during the time the contract was in force numerous job orders were issued, pursuant to which the work was completed by the Graham Ship Repair Company, and payment therefor, as prescribed by the contract, was made to you in accordance with an assignment dated January 31, 1945, executed by the contractor under the assignment of Claims Act of 1940, 54 Stat. 1029.

The record indicates that during the course of performance of the contract the administrative office ascertained that the contractor had failed to remit to the Collector of Internal Revenue the sums of $453,469.55, representing withholding tax, and $11,462.91, representing Federal unemployment tax, accruing under the contract. As a result thereof no further job orders were issued in connection with the contract after March 31, 1946. Thereafter, a final adjustment was made in the accounts of the contractor and because of the conflicting claims of the assignee and the Collector of Internal Revenue, the vouchers covering the balance due under the contract were submitted to this Office for direct settlement, administratively approved in the sum of $110,966.08.

By letter of November 3, 1949, the Deputy Commissioner of Internal Revenue transmitted a copy of a report dated [fol. 82] October 21, 1949, from the Deputy Collector of the 1st California District, reading, in pertinent part, as follows:

"It is the contention of the Collector of Internal Revenue of the 1st California District that in as much as the taxes involved were incurred under this contract NOBS 10230 and did not arise independently of the contract that the tax claim takes priority over the claim of the assignee.

"This contention is further enhanced by the Navy's interpretation of the contract. The Navy holds that the master contract has no effect until job orders are secured. Further, the taxes arising during the course of the contract are considered in establishing the job rates. The contractor therefore is reimbursed on the assumption that his taxes

are paid. The taxes therefore are definitely part of the costs of the contract. If that is true no valid assignment can be made until all the costs of the contract are met.

"The contractor (Graham Ship Repair Co.) when challenged by the Navy Department as to the payment of taxes, presented a check punched and cancelled by the Collector of Internal Revenue in the amount of $350,000.00. The contractor stated to the Navy Department that this check was his receipt for payment of taxes then due the Collector of Internal Revenue. This check was never presented to the Collector of Internal Revenue in payment of taxes due. It did however represent considerable effort on the part of the contractor to deceive the Navy Department and had the effect of continuing the job orders from the Navy. Shortly thereafter, the Navy Department made an audit of the books of the Graham Ship Repair Co. and discovered the fraud. No further job orders were forthcoming since the audit."

[fol. 83] The Assignment of Claims Act of 1940, supra, provides, insofar as pertinent to this case, that—

"Any contract entered into by the War Department or the Navy Department may provide that payments to an assignee of any claim arising under such contract shall not be subject to reduction or set-off, and if it is so provided in such contract, such payments shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of such contract."

The instant contract, under article 15(o), contains a provision to that effect pursuant to which the referred-to assignment was executed. While several contentions have been made by your attorneys in prior correspondence as to the merits of your claim, it was informally understood from a recent conference between them and representatives of this Office that the only basis upon which the claim now warrants consideration by this Office is the contention that the indebtedness of the contractor to the United States for the unpaid taxes arose independently of the contract and therefore that the claimed amount due may "not be subject to reduction or set-off" within the meaning of the involved

act. In that connection, it is contended in your brief dated January 2, 1948, that the indebtedness of the assignee-contractor arose under the revenue statutes and completely independent of the contract obligations with the result that the amount due may not be applied to the debts of the contractor due the United States. Also, in your attorney's brief of April 10, 1950, it is contended that the principal objective of the act was to provide absolute security to lending institutions which advanced money for national [fol. 84] defense purposes on the strength of an assignment of claims under Government contracts, and, therefore, that the Government would have no right to withhold from an assignee money due under an assigned contract merely because the contractor was indebted to the Government because of unpaid taxes.

At the outset, it may be noted that the Assignment of Claims Act of 1940, as originally proposed and as recommended by the Congressional committees which considered it, did not contain the provision here in question which prohibits set-offs by the Government in certain cases. That provision was proposed as an amendment on the floor of the Senate, and the purpose of the bill prior to the addition of such provision was merely to remove the restrictions in sections 3477 and 3737 of the Revised Statutes against the assignment of claims against the United States. As was stated by Senator Barkley in the hearings before the Senate Committee on Banking and Currency:

"* * * The main purpose is to permit contractors who may not have enough working capital—and this particularly affects small contractors—to go ahead with Government contracts; so that if they have to go to the bank and borrow money, they can assign the contract as security and they can get the money and can go ahead with the work; then when the work is completed and the Government is ready to pay the contractor, naturally the bank has a first claim on it."

No question appears to have arisen in the hearings, or at any time prior to the amendment of the bill, as to the right of the Government to withhold from the assignee

amounts due under a contract in order to liquidate any indebtedness of the assignor to the United States. The effect of the amendment, as stated by Senator Barkley in [fol. 85] proposing it, was to prohibit offsetting against a contract an indebtedness which the contractor might owe the Government "on account of some other contract or some other situation." And in response to an inquiry whether the amendment would not permit an unscrupulous contractor who owed the Government money to evade his liability, Senator Barkley stated that was possible, but that the Government would be in no worse position in collecting such a debt by reason of the proposed amendment, presumably because without the amendment the contractor could not undertake the contract, since a bank would not lend money on such a contract if the Government could come in and assert a claim against the contractor "on account of something else which had no relationship whatever to the contract and the defense program." It seems clear from the foregoing that it did not occur to the proponents of the provision here involved that it would prevent the setoff of debts to the Government which might arise by virtue of performance of the very contract which was assigned. Indeed, the words used in the statute, "arising independently of such contract," would appear to indicate an intent to exclude only those debts which were unrelated to the assigned contract.

In the letter of January 2, 1948, submitted by your attorneys, the contention is made that because the contractor's obligations as to withholding taxes and the Government's rights in enforcing such obligations are determinable solely by reference to the tax statutes, any such obligations and indebtedness deriving therefrom must arise independently of the contract involved. This contention appears to overlook the fact that no obligations under the pertinent tax [fol. 86] statutes can arise until wages are paid, and the specific obligations here involved did not arise until wages were paid for the performance of service under the instant contract. Thus, the present indebtedness owes its very existence to the performance of work under the assigned contract, and but for that contract such debt would never have arisen.

Obviously, it was known to the contractor when he executed the contract, and to you when you obtained the assignment thereunder, that wages would have to be paid for labor to perform the contract. Both you and the contractor knew that a part of those wages was required by law to be paid to the Collector of Internal Revenue, and that until such part of the wages was so paid the amount thereof would be owed by the contractor to the Government. It must have been apparent, also, that the stipulated contract compensation for direct labor hours was fixed in consideration of the payment of the contractor of the taxes involved. In other words, the contract could not be performed unless the very debt now in question arose. It seems more than clear that any indebtedness which necessarily and inescapably must be incurred in the performance of a contract cannot reasonably be said to arise "independently" of such contract.

For the foregoing reasons, it is the considered opinion of this Office that the indebtedness under consideration did not arise independently of contract No. NObs-10230 within the meaning of the Assignment of Claims Act of 1940, supra. Accordingly, since your right to payment of the funds is subject to all the equities available to the Government against the assignor so far as concerns the right of setoff for obligations of the assignor to the Government [fols. 87-88] arising out of the contract (*United States* v. *Munsey Trust Co.*, 332 U. S. 234; *Modern Industrial Bank* v. *United States*, 101 C. Cls. 808, 820), the amount otherwise found to be due under the final payment voucher will be withheld and applied to partial liquidation of the contractor's indebtedness to the United States. Therefore, your claim must be, and is, disallowed.

Very truly yours,

/s/ Lindsay Warren, Comptroller General of the United States

[fols. 89-90] GENERAL TRAVERSE—

Filed November 1, 1950.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

/s/ H. G. Morison, Assistant Attorney General.

REM

SRG

[fol. 91] IN THE UNITED STATES COURT OF CLAIMS

No. 49825

Central Bank, a corporation, Plaintiff,

v.

United States of America, Defendant.

STIPULATION OF FACTS—Filed Sept. 26, 1951

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel of record, that the following facts are true and may be included by the Court in its Special Findings of Fact, subject to the right of the parties to introduce other or further evidence not inconsistent with the facts herein stipulated.

I

The plaintiff is a corporation duly organized under and by virtue of the laws of the State of California, with a principal office and place of business in the City of Oakland, State of California. Throughout the years involved in this suit and up to the present date, the plaintiff was and is engaged in the banking business.

[fol. 92] II

On December 30, 1944, Graham Ship Repair Company, Oakland, California, entered into a contract with the Navy

Department of the United States for ship repair work. Said contract is known and identified as NObs-10239 and a copy of said contract is attached hereto as Exhibit 1 and by reference made a part hereof.

III

Said Graham Ship Repair Company was a partnership engaged in business at 501 First Street, Oakland, California, organized and existing under the laws of the State of California.

IV

On April 1, 1945, the contract entered into on December 30, 1944, by the Graham Ship Repair Company, Oakland, California, and the Navy Department of the United States, was amended by agreement between the parties. A copy of the agreement amending such contract is attached hereto as Exhibit 2 and by reference made a part hereof.

V

After the execution of said contract with the Navy Department of the United States, the Graham Ship Repair Company arranged with the plaintiff, Central Bank, Oakland, California, for the financing of the work under the contract and as security for the funds to be advanced the Graham Ship Repair Company on January 31, 1945, assigned the proceeds payable under the contract to the plaintiff bank. This assignment was made pursuant to the pro-
[fol. 93] visions of the Assignment of Claims Act of 1940, 54 Stat. 1029. A copy of the assignment is attached hereto as Exhibit 3 and by reference made a part hereof.

VI

The Contracting Officer, Bureau of Ships, Navy Department, the Disbursing Officer and the General Accounting Office were duly notified of the aforesaid assignment as required by the provisions of the Assignment of Claims Act of 1940. Copies of the notice of assignment, to which were attached copies of the assignment, are attached hereto as Exhibits 4, 5 and 6 and by reference made a part hereof.

VII

After the execution of the assignment the plaintiff did advance and loan to said Graham Ship Repair Company, the contractor, substantial sums of money to pay for labor and material costs in connection with the work of said Graham Ship Repair Company under its Navy Department Contract NObs-10230, and the amendment thereto. During the course of performance of the contract the appropriate administrative officers of the Government ascertained that the contractor had failed to pay over and remit to the Collector of Internal Revenue the sums of $453,469.55, withholding tax, and $11,462.91, federal unemployment tax. These amounts represented withholdings by the contractor from salaries and wages of employees or laborers of the contractor engaged in the performance of Navy Contract NObs-10230, dated December 30, 1944, which the contractor as an employer was required to withhold by the provisions of Sections 1401 and 1622 of the Internal Revenue Code, [fol. 94] and which the partners of the Graham Ship Repair Company, the contractor, had converted to their own use. Because of this failure of the contractor no further job orders were issued to it under Contract NObs-10230 after March 31, 1946. The partners in Graham Ship Repair Company, the contractor, were indicted in the United States District Court for the Northern District of California, Southern Division, under Section 2707(c) of the Internal Revenue Code (26 U.S.C., Sec. 2707(c)), for willful attempt to evade and defeat the payment of the aforesaid withheld taxes, and they pleaded guilty to the charge.

VIII

At the time the aforesaid contract was terminated the Graham Ship Repair Company was indebted to the Government for the unpaid withholding taxes, referred to in Paragraph VII above, which with interest and penalty aggregated $616,750.95. At that time there was due the contractor for work performed under Navy Contract NObs-10230 the sum of $110,966.08.

At that time the contractor was indebted to the plaintiff bank for an amount in excess of $110,966.08 for advances

made for labor and material costs in connection with that work, which amount is still outstanding and unpaid.

IX

By reason of the outstanding taxes due from the Graham Ship Repair Company referred to in Paragraph VIII, the Commissioner of Internal Revenue asserted a claim against the Navy Department for the balance due under the contract, namely, $110,966.08. The plaintiff also claimed payment of that amount under the assignment of the contractor [fols. 95-96] (Exhibit 3) and because of the conflicting claims the matter was referred by the Navy Department to the General Accounting Office for direct settlement.

X

By decision dated May 18, 1950, addressed to plaintiff, the Comptroller General of the United States ruled that the sum of $110,966.08 due the Graham Ship Repair Company was a proper setoff against the taxes due from the contractor referred to in Paragraph VIII and denied plaintiff's claim. A copy of that ruling is attached hereto as Exhibit 7 and by reference made a part hereof. Thereafter, by the issuance of appropriate Certificates of Settlement, the Comptroller General effected the aforesaid setoff, thereby reducing the tax indebtedness of the Graham Ship Repair Company to $415,018.17, which for purposes of this case plaintiff admits is still outstanding and unsatisfied.

XI

In December, 1946, the Commissioner of Internal Revenue duly made appropriate assessments of the taxes due from the Graham Ship Repair Company and thereafter and in December, 1946, the Collector of Internal Revenue at San Francisco, California, duly filed liens against that taxpayer for such taxes. Such liens were duly recorded.

/s/ Llewellyn A. Luce, Attorney for Plaintiff.

/s/ Theron L. Caudle, J.H.S., Assistant Attorney General.

[fols. 97-98] ARGUMENT AND SUBMISSION OF CASE

On April 7, 1952, the case was argued and submitted on merits by Messrs. George H. Koster and Llewellyn A. Luce for plaintiff, and by Mr. Joseph H. Sheppard for defendant.

[fol. 99] **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Littleton, J.—Filfed July 15, 1952.**

Messrs. Llewellyn A. Luce and George H. Koster for the plaintiff.

Mr. Joseph H. Sheppard, with whom was Acting Assistant Attorney General Mr. Ellis N. Slack, for the defendant. Mr. Andrew D. Sharpe was on the brief.

The plaintiff, assignee of the Graham Ship Repair Company, a partnership of Oakland, California, seeks to recover $110,966.08 representing the final balance due under a contract between the Graham Company and the Navy Department. The Government refused to pay said amount to plaintiff, the assignee of the contractor, but set off said amount in partial satisfaction of $464,932.46 taxes due from the contractor, the Graham Ship Repair Company. These taxes represented amounts withheld from salaries and wages of employees and laborers engaged in the performance of the Navy contract above mentioned.

The plaintiff contends that this set-off by the Government against the amount due it by the contractor was improper under the provisions of the Assignment of Claims Act of 1940 (54 Stat. 1029), because the claim of the Government against the contractor arose independently of the contract between Graham Company and the Government. The defendant insists that the offset was proper and legal because the withholding and social security taxes, which the contractor failed to pay to the Collector of Internal Revenue, [fol. 100] arose in connection with and were directly related to the contract between the Navy and the Graham Company.

The court, upon the facts as stipulated by the parties, and the briefs and argument of counsel, makes the following

Special Findings of Facts

1. The plaintiff is a California corporation with its principal office and place of business in the City of Oakland. Throughout the years involved in this suit and up to the present date, the plaintiff was and is engaged in the banking business.

2. On December 30, 1944, Graham Ship Repair Company, a partnership, Oakland, California, entered into a contract NObs-10230 with the Navy Department of the United States for ship repair work.

3. After the execution of said contract the Graham Ship Repair Company arranged with the plaintiff, Central Bank, Oakland, California, for the financing of the work under the contract and as security for the funds to be advanced the Graham Ship Repair Company on January 31, 1945, assigned the proceeds payable under the contract to the plaintiff bank. This assignment was made pursuant to the provisions of the Assignment of Claims Act of 1940, 54 Stat. 1029.

4. The Contracting Officer, Bureau of Ships, Navy Department, the Disbursing Officer and the General Accounting Office were duly notified of the assignment as required by the provisions of the Assignment of Claims Act of 1940.

5. After the execution of the assignment the plaintiff did advance and loan to Graham Company, the contractor, substantial sums of money to pay for labor and material costs in connection with the work of said Graham Company under its contract and the amendment thereto. During the course of performance of the contract the appropriate administrative officers of the Government ascertained that the contractor had failed to pay over and remit to the Collector of Internal Revenue the sums of $453,469.55, withholding tax, and $11,462.91, Federal unemployment tax. These amounts represented withholdings by the contractor from salaries and wages of employees or laborers of the contractor engaged in the performance of Navy Contract NObs-10230, [fol. 101] which the contractor as an employer was required to withhold by the provisions of Sections 1401 and 1622 of the Internal Revenue Code, and which the partners of the Graham Company, the contractor, had converted to their

own use. Because of this failure of the contractor no further job orders were issued to it under the contract after March 31, 1946. The partners in Graham Company, the contractor, were indicted in the United States District Court for the Northern District of California, Southern Division, under Section 2707 (c) of the Internal Revenue Code (26 U. S. C., Sec. 2707 (c)), for willful attempt to evade and defeat the payment of the aforesaid withheld taxes, and they pleaded guilty to the charge.

6. At the time the contract was terminated the Graham Company was indebted to the Government for the unpaid withholding taxes, referred to in finding 5, which with interest and penalty aggregated $616,750.95. At that time there was due the contractor for work performed under the contract the sum of $110,966.08.

At that time the contractor, was also indebted to the plaintiff for an amount in excess of $110,966.08, for advances made for labor and material costs in connection with that work, which amount is still outstanding and unpaid.

7. By reason of the above-mentioned outstanding taxes due from the Graham Company, the Commissioner of Internal Revenue asserted a claim against the Navy Department for the balance due under the contract, namely, $110,966.08. The plaintiff also claimed payment of that amount under the assignment of the contractor and because of the conflicting claims the matter was referred by the Navy Department to the General Accounting Office for direct settlement.

8. By decision dated May 18, 1950, addressed to plaintiff, the Comptroller General of the United States ruled that the sum of $110,966.08 due the Graham Ship Repair Company was a proper set-off against the taxes due from the contractor, and denied plaintiff's claim. Thereafter, by the issuance of appropriate Certificates of Settlement, the Comptroller General effected the aforesaid set-off thereby reducing the tax indebtedness of the Graham Ship Repair Company to $415,018.17, which for purposes of this case plaintiff admits is still outstanding and unsatisfied.

9. In December 1946, the Commissioner of Internal Revenue made appropriate assessments of the taxes due from [fol. 102] the Graham Ship Repair Company, and thereafter in December 1946, the Collector of Internal Revenue at

San Francisco, California, filed liens against that taxpayer for such taxes. Such liens were duly recorded.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes, as a matter of law that plaintiff is not entitled to recover, and the petition is dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion

Littleton, Judge, delivered the opinion of the court:

On December 30, 1944, the Graham Ship Repair Company, a partnership of Oakland, California, hereinafter referred to as the Graham Company, entered into a contract with the Navy Department for certain ship repair work. After the execution of the contract, the Graham Company arranged with plaintiff, a banking institution, for the financing of the work under contract and as security for funds to be advanced, the Graham Company, on January 31, 1945, assigned to plaintiff the proceeds payable to it under the contract, such assignment being made pursuant to the provisions of the Assignment of Claims Act of 1940 (54 Stat. 1029). Pursuant to such assignment plaintiff advanced to the Graham Company substantial sums of money for use in the performance of the contract. During the course of performance of the contract the Government ascertained that the Graham Company had failed to pay over and remit to the Collector of Internal Revenue the sums of $453,469.55, withholding tax, and $11,462.91, Federal unemployment tax, aggregating $464,932.46. These taxes represented amounts withheld from salaries and wages of employees or laborers of the contractor who were engaged in the performance of the Navy Contract, above referred to. The amounts so withheld had been converted by the partners of the Graham Com-
[fol. 103] pany to their own use. The Graham Company as an employer, was required to withhold and pay over these taxes to the Collector by the provisions of Sections 1401 and 1622 of the Internal Revenue Code. Because of the failure of

the contractor to pay such taxes to the Collector, the Navy Department declined to issue further job orders to the Graham Company and terminated the contract. The interest and penalties on the taxes which the Graham Company failed to pay, as required by law, amounted to $151,818.49, making a total of $616,750.95 due from the Graham Company on account of such taxes. The partners of the Graham Company were indicted for willful attempt to defeat and evade the payment of the withheld taxes and they pleaded guilty.

At the time the Navy contract with the Graham Company was terminated there was due to the Graham Company, for work performed under the contract, the sum of $110,966.08. At that time, also, the Graham Company was indebted to the plaintiff for an amount in excess of $110,966.08 for advances made by plaintiff in connection with the performance of the contract.

The taxes, interest, and penalties, due from the Graham Company were duly assessed by the Commissioner of Internal Revenue. Plaintiff made claim for the balance due under the contract but the Government refused to pay said sum to it, and by a final settlement certificate issued by the General Accounting Office, May 18, 1950, the sum of $110,966.08 due the Graham Company was offset in partial satisfaction of the indebtedness of the Graham Company to the United States. After this offset, there remained due from the Graham Company $415,018.17 which is still outstanding and unpaid.

The United States had the right to set off the amount here in question due from it to the Graham Company under the contract of December 30, 1944, *United States* v. *Munsey Trust Co.*, 332 U. S. 234; *Modern Industrial Bank* v. *United States*, 101 C. Cls. 808; *Seaboard Surety Company* v. *United States*, 107 C. Cls. 34; *Royal Indemnity Co.* v. *United States*, 117 C. Cls. 736. But the plaintiff contends that under the facts in this case such offset was improper and was prohibited by the provisions of the Assignment of Claims Act of 1940 (54 Stat. 1039), inasmuch as the indebtedness of the [fol. 104] Graham Company to the government for the taxes in question arose independently of the contract of December 30, 1944, between the Graham Company and the

Navy Department. The Assignment of Claims Act, so far as here material, provided as follows:

> Any contract entered into by the War Department or the Navy Department may provide that payments to any assignee of any claim arising under such contract shall not be subject to reduction or set-off, and if it is so provided in such contract, such payments shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of such contract.

We are of the opinion that the indebtedness of the assignor, the Graham Company, to the United States for the taxes in question was not so independent of the contract of December 30, 1944, as to preclude the Government from offsetting the balance due under the contract against such indebtedness. As hereinbefore stated, the tax indebtedness of the Graham Company arose by reason of and in connection with its performance of work under this contract. The assignee knew that the contractor would be required to withhold and pay taxes to the defendant. The obligation of the contractor for the taxes in question arose before the partners converted such taxes to their own use and such obligation was therefore directly associated with the contract. The tax obligation in question also had a direct relation to the contract. Section 1622a of the Internal Revenue Code, 26 U. S. C., 1622a, provides:

> Every employer making payment of wages shall deduct and withhold upon such wages a tax equal to 15 per centum of the amount by which the wages exceed the number of withholding exemptions claimed multiplied by the amount of one such exemption as shown in subsection (b) (1).

Section 1623 of the Internal Revenue Code provides that "The employer shall be liable for the payment of the tax required to be deducted and withheld under this subchapter, and shall not be liable to any person for the amount of any such payment."

We do not find anything in the history of the Assignment of Claims Act which requires the conclusion that Congress

[fols. 105-106] intended to take away from the Government the right, in a case such as this, to offset a balance due from it to an assignor against an indebtedness of the character here involved of such assignor. It is true that the indebtedness of the Graham Company for the taxes in question was not entirely dependent upon the contract; but we think it is clear that such indebtedness was not entirely independent of such contract. In order to be independent, as we think that term was used and intended by the Assignment of Claims Act, the indebtedness must arise irrespective of, exclusive of, and separate from the contract, and must have no direct relation with such contract. We think Congress intended that the above quoted provision of the Assignment of Claims Act should be interpreted and applied in accordance with the ordinary and natural meaning of the language used.

The defendant was not a mere stakeholder but was the owner of the fund amounting to $110,966.08 to be disbursed, and was also the owner of a claim against said fund. As a general proposition of law, the Government was in a better position than plaintiff as a claimant to a fund representing the balance due under the contract. In *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 240, the Court said:

> * * * And one whose own appropriation and payment of money is necessary to create a fund for general creditors is not a general creditor. He is not compelled to lessen his own chance of recovering what is due him by setting up a fund undiminished by his claim, so that others may share it with him. In fact, he is the best secured of creditors; his security is his own justified refusal to pay what he owes until he is paid what is due him.

From a careful consideration of the right of the Government, generally, to offset amounts due from it to a contractor against amounts due from such contractor, in the light of the facts in this case and the above quoted provision of the Assignment of Claims Act of 1940, we are of the opinion that the offset made by the defendant in this case was proper and that plaintiff is not entitled to recover. The petition is, therefore, dismissed. It is so ordered.

Howell, Judge; Madden, Judge; Whitaker, Judge; and Jones, Chief Judge, concur.

[fols. 107-108] JUDGMENT OF THE COURT—July 15, 1952

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover.

It is therefore adjudged and ordered that the plaintiff's petition be and the same is hereby dismissed.

[fols. 109-110] PROCEEDINGS AFTER ENTRY OF JUDGMENT

On August 13, 1952, the plaintiff filed a motion for a new trial.

On October 7, 1952, the court entered the following order on said motion:

ORDER

These cases come before the Court on motion for a new trial; and, on consideration thereof,

It is ordered this seventh day of October, 1952, that said motions be and the same are overruled as follows:

* * * * * * *

49825 Central Bank, a Corporation. Plaintiff's motion.

* * * * * * *

By the Court, /s/ Marvin Jones, Chief Judge.

[fol. 111] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 112] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 521

CENTRAL BANK, a Corporation, Petitioner,

vs.

THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 9, 1953

The petition herein for a writ of certiorari to the United States Court of Claims is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.